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ABSTRACT

This report reviews, in the context of their budget and staff resources, selected activities of six Federal agencies with significant responsibility for enforcing civil rights laws. They are: (1) the Department of Education's Office for Civil Rights; (2) The Department of Health and Human Services' Office for Civil Rights; (3) the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity; (4) the Department of Labor's Office of Federal Contract Compliance Programs; (5) the Equal Employment Opportunity Commission; and (6) the Department of Justice's Civil Rights Division. For each agency, the report evaluates major program components according to the agency's own objectives and other available measures of enforcement needs. The report identifies issues that should be tracked in the continuing budget process; discusses changing policies, demands, and procedures that may affect the way resources are used; and considers agency efforts to economize and improve management of civil rights enforcement. The report also discusses major policies pursued by the Justice Department's Civil Rights Division "because they indicate the direction of the Administration's civil rights enforcement commitments and influence other agencies' enforcement efforts." A statement critical of the report by the Civil Rights Commission's chairman, and a statement supporting it by other Commission members are also included. Appendices, which comprise about one-third of the document, contain correspondence between the Commission and the Office of Management and Budget, and between the Commission and the agencies reported on. (CMG)

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Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance

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INTRODUCTION

This report reviews, in the context of their budget and staff resources, selected activities of 6 Federal agencies with significant responsibility for enforcing civil rights laws. It is part of a continuing effort of the U.S. Commission on Civil Rights to increase understanding of the nature of Federal civil rights enforcement and the necessity of providing more adequate resources for it. 1/

Federal agencies enforce civil rights guarantees in the Constitution, laws enacted by Congress, and Executive orders. The genesis of these guarantees is the promise of equality for all persons growing out of the Civil War. 2/ Current civil rights protections were adopted because people were denied basic rights on

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1/ The Commission's concern about enforcement resources is longstanding. See, for example, U.S., Commission on Civil Rights: Federal Civil Rights Enforcement Effort (1971), p. 344 (hereafter cited as 1971 Enforcement Report); The Federal Civil Rights Enforcement Effort--1974, vol. II, To Provide for Fair Housing (1974), p. 355 (hereafter cited as 1974 Fair Housing Report); vol. III, To Ensure Equal Educational Opportunity (1975), p. 386; vol. IV, To Provide Fiscal Assistance (1975), pp. 20-22 (hereafter cited as To Provide Fiscal Assistance); vol. V, To Eliminate Employment Discrimination (1975), pp. 631, 639, 643 and vol. VI, To Extend Federal Financial Assistance (1975), pp. 23, 291, 488, 538, 668, 759, 775, 785 (hereafter cited as To Extend Federal Financial Assistance). For more recent and detailed analyses see U.S., Commission on Civil Rights: Civil Rights: A National, Not a Special Interest (1981), pp. 36-47 (hereafter cited as FY 82 Budget Statement) and The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982) (hereafter cited as FY 83 Budget Report).

2/ For a history of developments leading up to the adoption of the 13th, 14th and 15th amendments to the Constitution after the Civil War and subsequent legislation to reinforce and extend their protections, see FY 82 Budget Statement.

account of their race, color, national origin, sex, religion, handicap, or age. These laws commit the Federal Government to combating discrimination in employment, education, housing, health care, use of public buildings and transportation, access to credit and services, participation in the democratic process, and other areas of everyday life. 3/ A major responsibility of most agencies discussed in this report is to ensure that none of their funds support unlawful discrimination.

The Commission believes Federal civil rights enforcement is distinct from social programs whose benefits may be increased or decreased at the discretion of any administration or session of Congress. Providing special benefits is not the responsibility of civil rights agencies. Their duty is to enforce laws intended to demolish the lingering barriers to full participation faced by minorities, women, and older and handicapped persons. These barriers are the legacy of legally mandated or tolerated segregation and discrimination, and, experience has shown, can be dismantled only with the leadership and assistance of the Federal Government.

In short, civil rights laws create a unique and basic obligation in the Federal Government to protect and enhance legal rights. In the Commission's view, this special responsibility includes an obligation to provide adequate budget and staff

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3/ Key civil rights laws and related requirements are discussed in the succeeding chapters.

resources to enforce these laws. 5/

The adequacy of resources for civil rights enforcement must be assessed in light of the activities they would support, not merely their dollar value. Enforcing nondiscrimination effectively is a large task involving a variety of activities. Agencies must investigate and decide upon discrimination complaints. They also must collect and analyze statistical and other information about compliance with civil rights laws and regulations and conduct investigations where that information suggests widespread patterns of discrimination may be denying many persons' rights. These compliance reviews and other such investigations of patterns of discrimination are a crucial enforcement tool. They identify and correct more civil rights violations than investigations of individual complaints, provide relief for victims of discrimination who may be unaware of their rights or reluctant to seek them, and demonstrate a commitment to

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5/ See FY 83 Budget Statement, p. 117 and Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Michael J. Horowitz, Counsel to the Director, Office of Management and Budget (hereafter OMB) Aug. 10, 1982, enclosed staff memorandum, p. 2.

enforcement action that encourages voluntary compliance. 6/

Most complaint investigations and compliance reviews result in settlements with agreements to correct violations. Followup or monitoring reviews by the Federal agencies to ensure such agreements actually are carried out, therefore, also are important. 7/ When agreements cannot be reached or later are disregarded, agencies must initiate enforcement proceedings. 8/

Effective civil rights enforcement also involves technical assistance so that those who must comply understand their obligations and those who are protected know their rights. 9/

6/ U.S., Commission on Civil Rights: Making Civil Rights Sense Out of Revenue Sharing Dollars (1975), pp. 59-61; Enforcing Title IX (1980), p. 24; To Provide Fiscal Assistance, p. 66; To Extend Federal Financial Assistance, p. 188; FY 82 Budget Statement, pp. 34, 40-41; and FY 83 Budget Report, pp. 3-4. Agency studies indicate that compliance reviews are especially important in protecting the rights of very poor and non-English speaking individuals. U.S., Department of Education, Office for Civil Rights, "Salaries and Expenses," undated (prepared for February 1981 appropriations hearings), p. 326; Clarence Thomas, Assistant Secretary for Civil Rights, U.S. Department of Education, interview, Feb. 22, 1982. The compliance reviews considered to be a more effective enforcement tool included onsite investigations. Those involving only analyses of reported data, sometimes called "desk audits," are less effective. 1971 Enforcement Report, p. 219.

7/ To Provide Fiscal Assistance, p. 41; To Extend Federal Financial Assistance, p. 367.

8/ Enforcement may involve litigation to obtain court-ordered remedies or administrative proceedings to terminate Federal funds.

9/ For the importance of such outreach and related technical assistance efforts, see To Provide Fiscal Assistance, pp. 67-69; Enforcing Title IX, pp. 32, 41; Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letters to Cynthia G. Brown, Assistant Secretary for Civil Rights, U.S. Department of Education, Dec. 10, 1980 and Frederick T. Cioffi, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, Feb. 26, 1981.

Technical assistance can provide expert advice on identifying and resolving civil rights problems voluntarily. It also can enhance enforcement activity by State and local civil rights agencies, helping them to share more fully in the Federal enforcement effort. Technical assistance of this kind is particularly important where the law requires State and local agency involvement. 10/

Finally, Federal enforcement activities must be coordinated to ensure that agencies with similar responsibilities all carry them out properly and without wasteful or unduly burdensome duplication. Under Executive and Congressional mandates, some agencies have this additional important responsibility. 11/

By their nature, these enforcement tasks require substantial staff resources. It takes individualized expert attention to investigate specific problems, develop remedies for them, and monitor compliance with settlement agreements. Consequently, personnel costs are the largest expense in enforcement agencies' budgets, and changes in staffing levels have major impact on agencies' abilities to carry out their responsibilities. These

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10/ For discussion of such requirements, see chapters 3, 4, and 6.

11/ These include the Departments of Health and Human Services, Housing and Urban Development, and Justice and the Equal Employment Opportunity Commission. Their specific responsibilities are discussed in subsequent chapters dealing with these agencies. On the need for strong coordination, see U.S., Commission on Civil Rights: The Federal Civil Rights Enforcment Effort--1974, vol. V, To Eliminate Employment Discrimination, pp. 576-77, 618 and The Federal Civil Rights Enforcment Effort--1977, To Eliminate Employment Discrimination: A Sequel, pp. 331-35; Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to William M. Nichols, General Counsel, OMB, Sept. 12, 1980; FY 83 Budget Report, pp. 38, 61.

agencies also need funds for other purposes, such as information systems that permit them to monitor their own performance as well as analyze compliance information, staff travel to investigate complaints and conduct compliance reviews, and administrative overhead expenses such as rent, heat, and telephone service.

The Commission's analyses of resources for Federal civil rights enforcement consider whether the particular agencies discussed have been provided adequate resources to carry out effective enforcement programs. In 1981 and 1982, the Commission evaluated proposed budgets for civil rights components in the Departments of Education, Health and Human Services, and Justice, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs in the Department of Labor. While all Federal agencies have some equal opportunity responsibilities, these 5 agencies were selected for review because they have major responsibility for establishing Federal civil rights policy, coordinating enforcement activity throughout the Federal Government, and/or operating large programs that affect the well-being of those protected by Federal civil rights requirements.

These earlier reports attempted to identify trends across the agencies and within individual agencies over time. They also tried to put in clearer focus the impact of resource decisions on the capacity of the agencies to carry out their enforcement responsibilities.

Recognizing the need for economies, these reviews have addressed the possibility that proposed funding and staff cutbacks could be offset by strong leadership, better management, increased emphasis on the most cost-effective investigations, and better coordination. 12/ The Commission concluded in 1981 that such improvements, even if vigorously pursued, could not compensate for the proposed reductions and warned that progress in the Federal civil rights enforcement effort was jeopardized. 13/

Last year the Commission noted that budget cuts and inflation had seriously eroded total enforcement resources. 14/ That analysis also considered what the agencies reviewed had accomplished with their reduced resources as well as what they expected to accomplish with proposed resources for FY 83.

The effects of continuing budget constraints included reduced activities to combat widespread patterns of discrimination, inadequate support for State and local civil rights enforcement activities, diminished technical assistance, and unmet coordination needs. 15/ The agencies' FY 83 plans indicated these problems would persist and, in some cases, worsen. 16/ On this basis, the Commission concluded they would need additional funds to carry out their enforcement

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12/ FY 82 Budget Statement, p. 46.

13/ Ibid., p. 47.

14/ FY 83 Budget Report, pp. 5-6.

15/ Ibid., pp. 17-20, 27-28, 36, 38-39, 46, 58-59, 62.

16/ Ibid., pp. 64-66.

responsibilities adequately. It also noted that adequate resources would not ensure effective enforcement unless those resources were used to carry out effective policies. 17/

This report updates the two earlier reports and expands on them by adding a chapter on enforcement activities of the Department of Housing and Urban Development. 18/ It evaluates major components of each agency's program according to the agency's own objectives and other available measures of enforcement needs. The report identifies issues that should be tracked in the continuing budget process; discusses changing policies, demands, and procedures that may affect the way resources are used; and considers agency efforts to economize and improve management of civil rights enforcement. Focused principally on resources, it does not address all factors affecting performance. 19/ Nor does it generally include qualitative considerations requiring case-by-case analyses.

17/ The Commission expressed particular concern about proposals that would have reduced the effectiveness of the contract compliance programs. Ibid., pp. 40-41.

18/ Fair housing enforcement issues, including resource deficiencies, have been a longstanding Commission concern. See, for example, U.S. Commission on Civil Rights: Report of the United States Commission on Civil Rights (1959), pp. 534, 537; Commission on Civil Rights Report: Housing (1961), pp. 144-46; 1974 Fair Housing Report; and The Federal Fair Housing Enforcement Effort (1979).

19/ A more comprehensive evaluation could include, for example, agency organization and management, including field investigations of regional and local offices, and a systematic analysis of enforcement standards and their application.

The report, however, does discuss major policies pursued by the Justice Department's Civil Rights Division. These are a vital concern because they indicate the direction of the administration's civil rights enforcement commitments and influence other agencies' enforcement efforts. The discussion here can only summarize an extensive dialogue between the Commission and the Division on cases involving complex legal and factual distinctions. Numerous documents spelling out these distinctions and the major policy differences underlying them are cited in the notes.

Like the Commission's FY 83 budget report, this analysis discusses the agencies' actual spending power in light of inflation. There is no standard measure for the effects of inflation on Federal civil rights enforcement budgets, and many technical problems would be involved in developing one. Congressional Budget Office Gross National Product deflators, developed for analyses of the national economy, provide a general yardstick for considering the impact of inflation. These formulas offer a rough approximation when applied to Federal civil rights enforcement budgets, however, because some major items in these budgets, notably staff salaries, recently have risen more slowly than private sector expenses, while others may have risen more rapidly. The formulas nevertheless have been used in this report because meaningful budget trends cannot be determined without consideration of the declining value of the dollars allocated.

This review only touches on overall spending for civil rights enforcement. Such spending is a tiny fraction of the overall Federal budget. According to the latest published estimates, the administration expects $632.2 million to be spent for Federal civil rights enforcement in FY 84 if its budget proposals are adopted. 20/ Deficiencies in budget data make it difficult to compare this figure to previous expenditures or determine whether it would compensate for the steady toll taken by inflation. 21/ The unreliability of the data needed to make these assessments suggests continuing deficiencies in information the administration uses to analyze civil rights enforcement

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20/ U.S., Executive Office of the President, OMB, Major Themes and Additional Budget Details, Fiscal Year 1984, undated, p. 127. This total figure would include government-wide expenditures for the types of enforcement activity conducted by the 6 agencies discussed in this report and also government-wide expenditures for equal opportunity in Federal employment, this Commission's budget, and civil rights activities by the Postal Service and legislative branch.

21/ The Commission made such comparisons last year, using published OMB figures. It noted such figures had not always been reliable, but were the only total civil rights budget figures available. FY 83 Budget Report, p. 3 n. 10. OMB objected to the conclusions, saying its published figures were inaccurate. Michael J. Horowitz, Counsel to the Director, OMB, letter to Clarence Pendleton, Chairman, U.S. Commission on Civil Rights, June 25, 1982. Commission staff, therefore, asked OMB for clarification of its data in order to determine which, if any, figures could be used in this report. John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Michael J. Horowitz, Counsel to the Director, OMB, July 28, 1982 and enclosed staff analysis. OMB's response did not resolve the problems. Michael J. Horowitz, Counsel to the Director, OMB, letter to Clarence Pendleton, Chairman, U.S. Commission on Civil Rights, July 29, 1983. This exchange of correspondence is reproduced in an appendix to this report.

spending. 22/ The Commission believes, however, that the detailed information on these 6 agency budgets provides a solid basis for considering the adequacy of support for effective civil rights enforcement.

While there are many ways to evaluate the Federal civil rights enforcment effort, analyzing budget proposals and appropriations is essential. Budgets involve far more than mere allocations of funds. Presidents use their budgets to establish program and policy priorities. Individual agency budgets in turn establish their priorities and also report progress and previous enforcement activity, indicate problem areas, and project needs for future enforcement activity. The Commission's series of budget analyses have focused on executive budget proposals because they identify the administration's civil rights enforcement goals and indicate the extent to which the administration is willing to commit resources to meet them. Thus, a review of the President's proposed budget is also a review of the administration's performance and plans.

22/ For earlier concerns about OMB civil rights spending data and analyses, see Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to James T. McIntyre, Director, OMB, Mar. 25, 1980 and enclosed staff analysis; Deborah P. Snow, Acting Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, letter to Nathaniel Scurry, Assistant to the Director for Civil Rights, OMB, Dec. 17, 1980 and enclosed staff analysis; Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to Nathaniel Scurry, Assistant to the Director for Civil Rights, OMB, Mar. 17, 1981.

While the Congressional budget process begins with the President's proposals, the budget ultimately adopted by Congress reflects its own priorities. Congressional review of the proposed budget provides an opportunity to monitor and evaluate individual agency and overall administration performance in enforcing civil rights laws. The oversight process, as well as specific appropriations decisions, may significantly affect agency enforcement activity.

Developing Federal agency budgets has become a continuous process. As this report is published, agencies in the Executive branch are negotiating with the Office of Management and Budget on their FY 85 requests (to be sent to Congress in January 1984). Meanwhile, work is continuing on appropriations for the agencies' activities for FY 84 (which began October 1, 1983). 23/

Since this report reviews the agencies' accomplishments in meeting certain objectives in FY 82 and FY 83 and considers the adequacy of their budget and performance projections for FY 84, it is relevant to both the decisions to be made about the FY 85 budget and oversight of agency performance throughout FY 84. Like any estimate of future needs, it is based on a number of somewhat unpredictable factors. Its conclusions, therefore, must

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23/ As of Oct. 30, 1983, action was still pending on FY 84 appropriations for all the agencies discussed in this report except the Department of Housing and Urban Development. On Oct. 1, 1983, the President signed a continuing resolution (Pub. L. 98-107) to provide funding for these agencies through Nov. 10, 1983. [19 Weekly Comp. Pres. Doc. 1407 (Oct. 10, 1983).] As a result, the Health and Human Services Department's Office for Civil Rights (HHS/OCR) was funded at $418,000 and the Equal Employment Opportunity Commission (EEOC) at $3.9 million below their FY 84 request levels. (Cited in the respective chapters on these agencies). (Nancy Anderson, Staff, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Senate Committee on Appropriations, telephone interview, Oct. 24, 1983.) The Education Department's Office for Civil Rights (ED/OCR), the Office of Federal Contract Compliance Programs (OFCCP), and the Civil Rights Division were funded at their FY 84 request levels. (Ibid.; James Sullivan, Legislative Counsel, Civil Rights Division, Department of Justice, telephone interview, Oct. 28, 1983.)

On Oct. 20, 1983, the House and Senate agreed to a conference report for an appropriations bill (H.R. 3913, 98th Cong., 1st Sess.) funding ED/OCR, HHS/OCR, and OFCCP for the remainder of FY 84 [H.R. Rept. No. 422, 98th Cong., 1st Sess., 129 Cong. Rec. H8368-76(daily ed. Oct. 19, 1983); H8433-67 and S14306-10 (daily ed. Oct. 20, 1983)]. At this writing, it was awaiting the President's signature. OFCCP and HHS/OCR would be funded at the continuing resolution's appropriations levels, while ED/OCR would receive a $4.5 million increase. [For FY 84 appropriations see 129 Cong. Rec. H8438 (OFCCP), H8454 (HHS/OCR), and H8459 (ED/OCR) (daily ed. Oct. 20, 1983).] Congress had not completed action on FY 84 appropriations for the Civil Rights Division and EEOC by Oct. 30, 1983.

be somewhat tentative. They are not empty speculations, however, but projections based on trends the Commission has monitored closely for some time.

The information contained in this report was drawn from OMB and agency budget documents for FY 84 and earlier years; agency program plans, management reports, evaluations, policy statements and proposals, and Congressional testimony; legal briefs and decisions; and written and oral responses to Commission staff inquiries. In accordance with Commission policy, each of the 6 enforcement agencies discussed here was offered an opportunity to comment on the factual accuracy of an earlier draft of the relevant chapter of this report. All did so. 24/ This published version incorporates the most recent data they provided and many other comments and explanations they suggested should be considered. Some issues of continuing disagreement and gaps and inconsistences in data that precluded adopting some of the agencies' suggested revisions are noted in particular chapters.

The Commission appreciates the cooperation of the 6 agencies in preparation of the report. Interpretations of facts and conclusions reflect the views of the Commission, not the agencies.

24/ Each agency's comments are cited in the relevant chapter and reproduced in an appendix to this report.

DEPARTMENT OF EDUCATION: OFFICE FOR CIVIL RIGHTS

Enforcement Responsibilities

The Department of Education's Office for Civil Rights (OCR) is responsible for enforcing the prohibitions against discrimination based on race, sex, handicap, and age in Title VI of the Civil Rights Act of 1964, 1/ Title IX of the Education Amendments of 1972, 2/ Section 504 of the Rehabilitation Act of 1973, 3/ and the Age Discrimination Act of 1975. 4/ It must ensure nondiscrimination in all State education agencies and vocational rehabilitation systems, 16,000 school systems, 3,200 colleges and universities, 10,000 proprietary institutions (for-profit schools for career preparation), and other types of institutions, such as libraries and museums, that receive departmental funds. 5/

1/ 42 U.S.C. §§2000d-2000d-6 (1976 & Supp. V 1981). Title VI prohibits discrimination because of race, color, or national origin in any program receiving Federal financial assistance.

2/ 20 U.S.C. §§1681-1686 (1976). Title IX prohibits sex discrimination in federally-assisted education programs.

3/ 29 U.S.C. §794 (Supp. V 1981). Section 504 prohibits discrimination on the basis of handicap in all federally-assisted and federally-conducted programs.

4/ 42 U.S.C. §§6101-6107 (1976 & Supp. V 1981). The Age Discrimination Act bars discrimination because of age in programs and activities receiving Federal financial assistance.

5/ U.S., Department of Education, Office for Civil Rights (hereafter OCR), "Final Annual Operating Plan for Fiscal Year 1983," 48 Fed. Reg. 1789, 1791 (1983) (hereafter cited as FY 83 Operating Plan).

The laws OCR enforces seek to guarantee equal opportunity for approximately 12 million minority group students, 26 million women students, and 4 million handicapped students. 6/ They also prohibit employment discrimination against teachers and other school employees. 7/

Failure to enforce these laws effectively has subjected OCR to court orders for many years. 8/ The Federal district court recently found OCR was not complying with its requirements and

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6/ OCR does not collect data on individuals protected under the Age Discrimination Act. Frederick Tate, Special Assistant to the Assistant Secretary, OCR, telephone interview, Aug. 23, 1983.

7/ See 34 C.F.R. §§100.3(c), 104.11, 106.51 (1982) (the Department's Title VI, Title IX, and Section 504 regulations prohibiting discriminatory employment practices). See also North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

8/ See Adams v. Richardson, 356 F. Supp. 92, 94 (D.D.C. 1973), *modified and aff'd.*, 480 F.2d 1159 (D.C. Cir. 1973), *supplemental order sub. nom.* Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975), *second supplemental order sub. nom.* Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (hereafter cited as Dec. 1977 Adams/WEAL Order). The early orders addressed delays in OCR's enforcement of Title VI. The 1977 order also covered Title IX and section 504 enforcement. In addition to addressing cases already delayed, it required OCR to process all new complaints and conduct compliance reviews within certain time frames. It also required certain surveys to identify probable compliance problems and reports on OCR's operations and plans.

substantially reaffirmed them. 9/ OCR recently has intensified efforts to comply with the order and made significant progress in areas where it can exercise some discretion, notably compliance reviews. Staff shortages, however, apparently contributed to OCR's Adams problems and limited its discretionary activities. 10/ OCR's resources nevertheless

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9/ Adams v. Bell, No. 3095-70, and Women's Equity Action League v. Bell, No. 74-1720 (D.D.C. Mar. 11, 1983) (hereafter cited as 1983 Adams/WEAL Order). The court found that its 1977 order had "been violated in many important respects" and that its requirements remained important because "if the government is 'left to its own devices, the manpower that normally would be devoted to this type of thing, ... might be shunted off into other directions, will fade away and the substance of compliance will eventually go out the window.'" Slip op. at 2.

In addition to reaffirming, with some modifications, the 1977 time frames, the new order specifies Education Department plans for several major surveys including, in FY 84, an elementary and secondary school survey OCR regularly has conducted and a vocational education survey it conducted only once in 1979. The order states in part, "ED also intends to conduct a survey of vocational schools based on the updated universe of recipients included in the Fall 1979 Vocational Education Civil Rights Survey at least once every four years beginning in fall 1983." Id. at 16. Contrary to Commission views, OCR does not believe this constitutes a requirement for the survey in FY 84. Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 23, 1983 (hereafter cited as Singleton September Letter), enclosed "Specific Comments on the Civil Rights Commission's Chapter on OCR," p. 1 (hereafter cited as OCR Comments). The new order also adds reporting requirements. 1983 Adams/WEAL Order at 17-20.

The Education Department has appealed this order, asking that all the requirements governing OCR's operations be eliminated. Brief for Appellants at 27-30, 78, Adams v. Bell, No. 83-1590, and Women's Equity Action League v. Bell, No. 83-1516 (D.C. Cir., brief filed Sept. 19, 1983) (hereafter cited as 1983 Adams/WEAL Appellants' Brief).

10/ U.S., Commission on Civil Rights, The Federal Civil Rights Enforcement Budget, Fiscal Year 1983 (1982), pp. 15-21 (hereafter cited as FY 83 Budget Report).

would be reduced under the proposed FY 84 budget. 11/ OCR's ability to carry out statutory and judicially imposed requirements thus would be jeopardized.

Budget Totals

As table 1 shows, funding for OCR has dropped sharply since the beginning of FY 80. 12/ There is no exact measure of OCR's additional losses in spending power due to inflation. A general yardstick for considering the impact of inflation is

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11/ In addition to inadequate staff, OCR may lack funds for surveys required by the new Adams order. The proposed FY 84 budget was developed before the order was issued and makes no specific reference to surveys. While OCR might well have planned to survey elementary and secondary schools, it is doubtful the agency expected it would have to survey vocational education programs in FY 84. OCR estimates that this survey, if conducted in FY 84, would cost about $800,000. OCR Comments, p. 1. New Adams reporting requirements also may entail expenditures not envisioned in the proposed FY 84 budget.

12/ OCR suggests the appropriate figure to use as a baseline for its declining funds would be what the Office of Management and Budget allocated to it when it was reorganized in the new Education Department (67 percent of the FY 80 resources authorized for civil rights enforcement in the Department of Health, Education, and Welfare). Singleton September Letter. The Commission has used 80 percent of the FY 80 authorization because this is consistent with OCR's estimate of the percentage of Health, Education, and Welfare enforcement resources used for education activities. Fred T. Cioffi, "Report to the Court and Plaintiffs on OCR's Efforts to Comply with the Consent Order dated December 29, 1977, in Adams v. Califano, Civ. No. 70-3095 (D.D.C.)," Declaration in Support of Defendants' Opposition to Plaintiffs' Motion for Order to Show Cause, Exhibit I (May 27, 1981) at 14 (hereafter cited as Cioffi Affidavit). The original FY 80 appropriation itself represented a cut of $3 million below the preceding year. OCR, "Salaries and Expenses, 11 Year History of OCR Appropriations," undated, Tab A (hereafter cited as History of OCR Appropriations).

Table 1

OCR Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980 (HEW)	$53,953 b/
1980 (Education)	45,847
1981	46,915
1982	45,038
1983	44,868
1984 (Request)	42,058

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a/ Figures represent what OCR could have spent during a whole fiscal year under each spending ceiling.

b/ OCR's estimate of its 1980 appropriation in the Department of Health, Education, and Welfare that was allocated for education enforcement activities.

SOURCES: U.S., Department of Education, Office for Civil Rights: "Salaries and Expenses, 11 Year History of OCR Appropriations," undated (for above FY 80 HEW and Education appropriations); "Salaries and Expenses," undated (prepared for March 1982 appropriations hearings) (for FY 81 appropriation); Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983, Enclosure A (for FY 82 and FY 83 appropriations); U.S., Department of Education, "Education Activities, Salaries and Expenses," undated (submitted to Subcommittees on Labor, Health and Human Services, and Education of the House and Senate Committees on Appropriations, March 1983), p. 269 (for FY 84 request).

provided by Congressional Budget Office Gross National Product deflators. Although these are not geared specifically to rising costs in the Federal sector, they may offer a rough approximation of trends in enforcement resources, including OCR's. 13/ Adjusting for inflation with the Congressional Budget Office formula, OCR would appear to have lost nearly 33 percent of its actual spending power during the last 3 years. 14/

A $2.8 million cut in OCR's budget is proposed for FY 84. 15/ Applying the appropriate deflator, this would leave the agency about 57 percent of the spending power it had to comply with the *Adams* order and increase discretionary

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13/ For a fuller discussion of the use and limits of these measures, see chapter 1.

14/ This estimate is derived by dividing OCR's appropriation by a factor that accounts for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 20, 1983. OCR notes that, if the base used were the annualized FY 80 appropriation for its activities in the Education Department, the loss would be approximately 20 percent ($9 million). OCR Comments, p.1. The Commission used OCR's annualized estimate of FY 80 expenses for education enforcement in the Department of Health, Education, and Welfare because this more accurately represents the agency's resources for two-thirds of the fiscal year. For this estimate, see History of OCR Appropriations.

15/ U.S., Department of Education, "Education Activities, Salaries and Expenses," undated (submitted to Subcommittees on Labor, Health and Human Services, and Education of the House and Senate Committees on Appropriations, March 1983), p. 269 (hereafter cited as OCR FY 84 Budget).

activities in 1979. 16/ OCR could wind up with even less than this because, as the budget now is structured, funds appropriated for OCR could be transferred to other activities. 17/

16/ OCR's budget requests to comply with the 1977 order were not fully reflected in its appropriation until 1979. Cynthia G. Brown, Statement to the Court of November 2, 1979, Adams v. Harris, Civ. Action No. 3095-70 (D.D.C. Nov. 2, 1979). Exhibit I at 3 (hereafter cited as Brown Affidavit). In addition to Adams compliance, OCR's 1979 budget also provided nearly $9 million for its then new technical assistance program. U.S., Department of Education, OCR, "OCR Technical Assistance Funding History," undated (hereafter cited as Technical Assistance Funding History), Tab B. The comparison between FY 79 and projected FY 84 spending power is based on OCR's estimate that 80 percent of its resources in the Department of Health, Education, and Welfare were used for education enforcement activities. The estimated loss, however, may be too low. In FY 79, OCR planned to spend 85 percent of its resources on education issues. Shirley M. Hufstedler, Secretary of Education, letter to James T. McIntyre, Jr., Director, Office of Management and Budget, Dec. 18, 1979 (hereafter cited as Hufstedler Letter), enclosed "Detailed Discussion of OCR Activities."

17/ A change in the structure of the Education Department budget would consolidate OCR's FY 84 appropriation with appropriations for program administration and the Office of the Inspector General. This has been described as a technical change that would maintain OCR's "budgetary independence." Charles L. Heatherly, Deputy Under Secretary for Managment, Department of Education, statement, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1984, before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 98th Cong., 1st sess., p. 1186 (1983) (hereafter cited as FY 84 Appropriations Hearings). Funds proposed for OCR, however, could be used for the two other programs in the same account. The Department has not ruled out this possibility, but has said it would seek Congressional consent to any transfer of funds from one account to another. Commission staff notes on testimony of Charles L. Heatherly before the Subcommittee on Labor, Health and Human Services, and Education of the Senate Committee on Appropriations (maintained in Commission files).

Staffing

Historically, OCR enforcement has been unduly slow, partly because of staff shortages. 18/ The 1977 Adams order, therefore, required OCR not only to complete certain activities within specific time frames, but also to request the additional positions compliance would require. 19/ OCR did not receive all the positions it requested to meet the court-ordered deadlines and increase reviews to remedy institution-wide patterns and practices of discrimination. 20/ It, moreover, soon began losing staff it had obtained, 21/ a trend that has continued, as table 2 shows.

18/ U.S. Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. III, To Ensure Equal Educational Opportunity (1975), pp. 12-15 (hereafter cited as To Ensure Equal Educational Opportunity) and Enforcing Title IX (1980), pp. 25-26, 39. For a discussion of specific links between delays in OCR enforcement activities and staff shortages, see FY 83 Budget Report, p. 17, n. 42.

19/ Dec. 1977 Adams/WEAL Order.

20/ Brown Affidavit at 3-4. The order required OCR to conduct "an appropriate number" of compliance reviews to ensure adequate civil rights enforcement. Dec. 1977 Adams/WEAL Order at 15. OCR apparently interpreted this to mean a substantially enhanced compliance review program. As evidence of its compliance with the order, it cited 272 reviews initiated in 1978 and 560 reviews initiated in 1979. Brown Affidavit at 25-26. See pp. 30-31 of this report for numbers of reviews initiated in more recent years.

21/ Id. at 4; Cioffi Affidavit at 13-14.

Table 2

OCR Full Time, Permanent Staff Positions: FY 1980-84

Fiscal Year	Authorized a/	Actual b/
1980 (HEW)	1,514 c/	1,314
1980 (Education)	1,181	1,048 d/
1981	1,098	1,055
1982	1,026	1,025
1983	945	913 e/
1984 (Request)	945	---

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a/ Number of full time, permanent staff permitted under Congressional budget measures.

b/ Number of full time, permanent staff actually employed by OCR. Except as noted, figures are for the first day of the fiscal year.

c/ Based on OCR's estimate of resources used for education enforcement activities in the Department of Health, Education, and Welfare.

d/ As of May 1980, when the Education Department officially began operations.

e/ As of July 30, 1983.

SOURCES: Kassie Billingsley, Chief, Planning and Budgeting Branch, OCR, interview, Mar. 4, 1982 and telephone interview, Aug. 18, 1983 (for FY 80-FY 81 authorized and actual figures and FY 83 actual figure); Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983, Enclosure A (for FY 82 authorized and actual figures, FY 83 authorized figure, and FY 84 request).

In 1981, the Adams plaintiffs again sought relief for excessive delays. 22/ By the time of the court hearing, OCR had about two-thirds of the positions it once thought necessary to carry out its obligations 23/ and lacked funds to keep them all filled. 24/ As noted, the court found substantial violations of its 1977 order and reaffirmed its essential requirements, suggesting they were necessary to preserve enforcement "manpower." 25/ OCR, however, has lost an additional 81 positions in FY 83 and would receive no increase under the proposed FY 84 budget.

22/ Adams v. Bell, No. 3095-70, Plaintiffs' Motion for Order to Show Cause (D.D.C. Apr. 22, 1981); Women's Equity Action League v. Bell, No. 74-1720, Plaintiffs' Women's Equity Action League Motion for Order to Show Cause (D.D.C. June 24, 1981).

23/ This percentage is based on OCR's original request for additional positions, its estimate of the percentage of resources used for enforcement in education before the division of the Department of Health, Education and Welfare, and its estimate of the minimum percentage of those resources needed to carry out its education enforcement obligations. See Brown Affidavit at 4; Cioffi Affidavit at 13; Hufstedler Letter.

24/ Kassie Billingsley, Chief, Planning and Budgeting Branch, OCR, interview, Mar. 4, 1982 (hereafter cited as Billingsley Interview). It is unclear whether OCR's original estimate was accurate or whether it still would have needed the same number of positions for Adams compliance. By FY 82, for example, OCR was receiving substantially fewer complaints than when the order was issued. U.S., Department of Education, OCR, "Second Annual Report," March 1983, p. 17 (hereafter cited as OCR Annual Report).

25/ 1983 Adams/WEAL Order at 2.

Staff shortages alone do not account for OCR's failures to meet the deadlines set in the *Adams* order. 26/ Agency policies and management also are important factors. 27/ There have

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26/ OCR has maintained that declining staff levels have not been a factor in its *Adams* compliance problems or otherwise weakened its enforcement program. Commission staff notes on testimony of Clarence Thomas, Assistant Secretary for Civil Rights, in hearing an order to show cause in Adams v. Bell, No. 3095-70, and Women's Equity Action League v. Bell, No. 74-1720, Mar. 12, 1982 (maintained in Commission files) (hereafter cited as Thomas Testimony); Joan M. Standlee, Deputy Assistant Secretary for Civil Rights, Department of Education, interview, Dec. 21, 1982 (hereafter cited as Standlee 1982 Interview). Some of the problems OCR has identified, however, could be minimized with more staff resources. *FY 83 Budget Report*, p. 17, n. 42. For resource-related compliance problems, such as deadlines missed due to "heavy workload," see also analyses developed by OCR contractor in OCR, "*Adams* Time Frames Study, Phase II: Case-by-Case Analysis," May 26, 1982.

27/ OCR, for example, has chosen to prolong negotiations past the *Adams* deadline when it believed a settlement eventually could be reached. Thomas Testimony. It, moreover, suspended processing of all cases in a number of categories because they involved issues which were under review by headquarters. *Enforcing Title IX*, pp. 19, 22-24; Michael A. Middleton, Deputy Assistant Secretary for Civil Rights, memoranda to Clarence Thomas, Assistant Secretary for Civil Rights, and Regional Directors, Dec. 3, 1981 (hereafter cited as Middleton Memoranda). It also suspended processing of all employment cases when several appellate courts ruled it lacked jurisdiction. *Enforcing Title IX*, pp. 20-22; OCR Comments, p. 2. For recommendations against this procedure, see *Enforcing Title IX*, p. 39; William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to Clarence Thomas, Assistant Secretary for Civil Rights, Apr. 9, 1982.

been some changes in these areas. 28/ Even further improvements, however, probably would not produce a vigorous, well-balanced, timely program of enforcement activities so long as current staff constraints persist. 29/

Complaint Processing

Complaint investigations are a less effective enforcement tool than compliance reviews. 30/ Resolving complaints,

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28/ For example, OCR has instructed regional offices to process cases in most "hold" categories established for issues under internal review. Middleton Memoranda. It also developed a manual and provided staff guidance to expedite processing of Title IX employment cases that had been put on hold pending a Supreme Court ruling on its jurisdiction. Harry M. Singleton, Assistant Secretary for Civil Rights, statement before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor and Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 18, 1983, p. 3 (hereafter cited as Singleton Enforcement Testimony).

29/ OCR estimates that nearly 98 percent of its current staff resources are used for activities required by the Adams order. Singleton Enforcement Testimony, p. 6. Under the proposed FY 84 budget, this would mean approximately 20 staff would be available for supplementary analyses of compliance information, such as needs assessments, technical assistance, and other important activities not specifically required by the order, including monitoring of voluntary remedial plans and State agency activities.

30/ U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. IV, To Provide Fiscal Assistance (1975), p. 66 (hereafter cited as To Provide Fiscal Assistance); Making Civil Rights Sense Out of Revenue Sharing Dollars (1975), pp. 59-61; Enforcing Title IX, p. 24; Civil Rights: A National, Not a Special Interest (1981), pp. 40-41 (hereafter cited as FY 82 Budget Statement); "Staff Comments on Annual Operating Plan for Fiscal Year 1982 Proposed by the Office for Civil Rights, Department of Education," Nov. 16, 1981, pp. 1-2 (hereafter cited as FY 82 Operating Plan Comments); and FY 83 Budget Report, pp. 3-4, 65. For OCR's concurrence with this assessment see, for example, Singleton September Letter.

however, has been OCR's top priority, due at least in part to Adams requirements. 31/ In the past, OCR repeatedly underestimated the amount of time complaints would require and, as a result, did not have enough staff to meet its compliance review goals. 32/ This situation changed in FY 82, principally because OCR received substantially fewer complaints than expected. 33/ Increased use of an expedited complaint resolution process also may have freed some staff time for

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31/ The 1977 Adams order required OCR to resolve all complaints within specific time frames. It also established time frames for compliance reviews, but did not specify how many OCR had to conduct. Dec. 1977 Adams/WEAL Order at 13-16. OCR, therefore, has tended to emphasize complaints processing. 1983 Adams/WEAL Appellants' Brief at 70-71.

32/ Brown Affidavit at 2, 26-28; Enforcing Title IX, p. 25; Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter and enclosed staff comments on Office for Civil Rights Proposed Fiscal Year 1981 Annual Operating Plan, to Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education, Sept. 29, 1980 (hereafter cited as FY 81 Operating Plan Comments); FY 82 Operating Plan Comments, p. 2.

33/ Maureen Browne, Chief, Reports and Analysis Branch, OCR, interview, May 10, 1983 (hereafter cited as Browne Interview). Assuming it would receive 2,786 complaints in FY 82, OCR planned to initiate approximately 80 compliance reviews. OCR, "Implementation Plan for Executive Order 12250," undated (submitted to the Department of Justice pursuant to a request for plans by February 1982), pp. 4-5 (hereafter cited as OCR Implementation Plan). OCR actually received 1,840 complaints and began 208 reviews. OCR Annual Report, pp. 17, 23.

compliance reviews. 34/

OCR expects complaints to remain at about the FY 82 level in FY 83 and FY 84. 35/ This projection is quite uncertain because OCR does not know why complaints have fallen off. 36/ Even if it is accurate, relative staff allocations to complaints and other activities, such as compliance reviews, may shift. Recent initiatives limiting management information

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34/ Under the early complaint resolution process, OCR attempts to mediate settlements between parties to a complaint. If a settlement is reached, OCR does not conduct a full-scale investigation and, thus, saves staff resources. An unsuccessful mediation effort, on the other hand, adds to the staff time complaint resolution requires. Project on Equal Education Rights, NOW Legal Defense and Education Fund, and SRI International, "The Settlement Solution: Assessing Mediation as a Tool in the Enforcement of Civil Rights," prepared for OCR, October 1980, p. 60. Early complaint resolution was instituted in all regional offices in early FY 82. Michelle Craig, staff, Reports and Analysis Branch, OCR, telephone interview, July 6, 1983. OCR does not have data on staff time devoted to mediation. Ibid. FY 83 data on the number of cases where early complaint resolution was attempted and the number where it produced settlements suggest the process has saved relatively little staff time. It nevertheless may be a useful option in certain types of cases. OCR reports plans to analyze existing FY 82 and FY 83 data to determine the effectiveness of the process. OCR Comments, p. 2.

35/ Browne Interview.

36/ Ibid.

make reliable projections in this area very difficult. [37]

Compliance and Other Reviews

OCR has found that its compliance reviews produce twice as many remedies and benefit six times as many victims of discrimination as its complaint investigations. [38] Reviews are especially vital to enforcing the rights of low-income and of non-English speaking individuals, who tend not to file complaints. [39] Lack of resources in this area, therefore, has been a major Commission concern. 40/

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[37] OCR, for example, ceased collecting information it formerly used to estimate how much investigator time its expected complaints caseload would require. Ibid. Such information might suggest that more or less staff time would be absorbed by complaints in FY 83 and FY 84 if receipts remain at the FY 82 level. OCR plans to implement a new system which it believes again will permit such estimates in the future. OCR Comments, p. 2. OCR also no longer estimates the staff resources it will use for each type of enforcement activity. FY 83 Operating Plan. For the need for such estimates to assess OCR plans and resources for carrying them out, see John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Harry M. Singleton, Assistant Secretary for Civil Rights, Nov. 17, 1982, pp. 2-3 (hereafter cited as OCR Issues Letter).

[38] Roma J. Stewart, Director, OCR, Department of Health, Education, and Welfare, response to Commission staff request for information, Feb. 8, 1980, cited in Enforcing Title IX, p. 24. See also OCR Annual Report, p. 22.

[39] For OCR views to this effect, see OCR, "Salaries and Expenses," undated (prepared for February 1981 appropriations hearings), p. 326; Cynthia G. Brown, former Assistant Secretary for Civil Rights, interview, Mar. 10, 1981; Clarence Thomas, Assistant Secretary for Civil Rights, interview, Feb. 22, 1982. The Adams order requires reviews to protect groups underrepresented by complaints. See Dec. 1977 Adams/WEAL Order at 16; 1983 Adams/WEAL Order at 10-11.

From FY 80 through FY 82, declining resources led OCR to plan fewer compliance reviews each year. 41/ Whereas OCR planned to begin 256 reviews in FY 80, 42/ it planned to allocate enough staff for approximately 83 new reviews in FY 81. 43/ For FY 82, it ultimately projected 78 new reviews. 44/ These plans would have provided for new reviews of fewer than 3 percent of the school systems and postsecondary institutions OCR had good reason to believe should be investigated for serious violations of major civil rights

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40/ To Ensure Equal Educational Opportunity, pp. 61-62; Enforcing Title IX, pp. 25-26, 40; FY 82 Operating Plan Comments, pp. 7-8; FY 82 Budget Statement, p. 46; FY 83 Budget Report, pp. 16-18; OCR Issues Letter, pp. 2-3.

41/ FY 83 Budget Report, pp. 16-18.

42/ U.S., Department of Health, Education, and Welfare, "FY 1980 Annual Operating Plan--Education--Compliance Review Issues," unpublished, undated revision (sent to Commission staff on Feb. 28, 1980). For delays in carrying out these plans and Commission views that additional staff might be required, see Enforcing Title IX, pp. 25-26, 39-40.

43/ In FY 81, OCR stopped publishing estimates of the numbers of reviews it would begin. In response to Commission staff comments, however, it published averages of the amount of time reviews addressing each type of compliance problem would take. OCR, "Annual Operating Plan for Fiscal Year 1981," 46 Fed. Reg. 5034, 5038 (1981) (hereafter cited as FY 81 Operating Plan). From these, staff estimated the number of reviews OCR could be expected to initiate.

44/ OCR Implementation Plan, p. 4. OCR plans published in March 1982 indicated it could be expected to begin somewhat fewer new reviews. OCR, "Annual Operating Plan for Fiscal Year 1982," 47 Fed. Reg. 9900, 9903 (1982); FY 81 Operating Plan, p. 5037; FY 83 Budget Report, p. 17.

requirements. 45/ As noted, the agency substantially exceeded its FY 82 projection, actually initiating 208 reviews and completing 240. 46/ Even with this enhanced review effort, however, it still was able to cover only about 8 percent of recipients apparently in severe noncompliance. 47/

Complaint receipts have continued to decline. 48/ It is unclear whether OCR's compliance reviews can be expected to increase accordingly. 49/ In FY 83 OCR probably maintained, if not exceeded, the FY 82 level. 50/ Despite declining

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45/ OCR, "Data Elements for FY 1983 Compliance Reviews and Remedial Plan Monitoring," June 30, 1981 (hereafter cited as Compliance Review Data Elements). This analysis, developed for FY 83 budget proposals, was based on OCR survey data. It classified 2,526 recipients as "in severe noncompliance" and, on this basis, estimated the percentage of need OCR's compliance reviews would meet at projected budget levels.

46/ OCR Annual Report, p. 23. OCR also exceeded its FY 81 projection, actually beginning 138 new compliance reviews that year. OCR Comments, p. 2; OCR Annual Report, p. 22.

47/ This percentage is based on OCR estimates of statistically probable violations in Compliance Review Data Elements. OCR staff could not provide an update of this crucial needs assessment.

48/ Second Quarter FY 83 Management Report, p. 4.

49/ As of March 1983, OCR expected to begin slightly fewer new reviews (200) than it began in FY 82, but indicated more could be started if its complaint workload declined. FY 84 Appropriations Hearings, p. 1221 (information submitted for the record). In September 1983, OCR reported it planned more reviews for FY 83 and FY 84 than were planned for FY 80 (256). It, however, did not indicate the number of reviews planned. OCR Comments, p. 2.

50/ As of the end of the third quarter of FY 83, OCR had begun onsite investigations in 204 reviews. Singleton September 1983 Letter. This is almost as many as OCR began during the whole of FY 82. OCR Annual Report, p. 23.

complaint receipts, however, OCR expects "no great change" in the level of its compliance review effort in FY 84, 51/ presumably because staff resources also have been declining steadily while other demands on them are scheduled to increase. Specifically OCR proposes to use staff for technical assistance activities formerly carried out by contract personnel. 52/ If these activities remain at all comparable in scope and kind, it is difficult to see how they will not limit staff resources now available for compliance reviews. 53/

Other factors also may hinder progress in OCR's compliance review effort. For example, funds originally expected to support staff now may have to be used for unbudgeted surveys and changes in information systems required by the new Adams order. In addition, OCR may be required to increase other activities it minimized to save resources during the last

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51/ FY 84 Appropriations Hearings, p. 1221 (information submitted for the record).

52/ OCR FY 84 Budget, p. 276.

53/ OCR has said compliance reviews will not be affected. FY 84 Appropriations Hearings, p. 1219 (testimony of Harry M. Singleton).

several years. 54/

Resources for followup reviews to ensure that compliance plans actually are carried out apparently will remain inadequate. 55/ Court orders require OCR to monitor implementation of higher education desegregation plans and plans to ensure equal educational opportunity for language minority children. 56/ In FY 82, OCR expected these commitments would leave the equivalent of only 5 full time investigators to monitor all other remedial action plans

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54/ OCR formerly was required to review the Title VI compliance status of all prospective recipients of Emergency School Aid Act (ESAA) grants. 20 U.S.C. §3200 (Supp. V 1981) (repealed effective Oct. 1, 1982). These pregrant reviews often obtained prompt corrective action and focused OCR attention on problems it otherwise might have neglected. To Ensure Equal Educational Opportunity, pp. 96-97, 360; Cynthia G. Brown, former Assistant Secretary for Civil Rights, Department of Education, statement before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Sept. 9, 1982, pp. 6-7. Required pregrant reviews under ESAA were eliminated by the inclusion of the program in the education block grant. Education Consolidation and Improvement Act of 1981, 95 Stat. 463, 480 (1981). OCR since has conducted considerably fewer pregrant reviews because it lacked resources to conduct such reviews where not specifically required. OCR Annual Report, p. 30; Kristine M. Marcy, Director, Planning and Compliance Operations Service, OCR, interview, Mar. 5, 1982 (hereafter cited as Marcy interview). A bill to reauthorize ESAA as a separate program, which could require OCR to resume substantial pregrant activity, is under consideration in Congress. H.R. 2207, 98th Cong., 1st Sess. (1983); S. 1256, 98th Cong., 1st Sess. (1983). For the importance of this measure, see John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Daniel Patrick Moynihan, U.S. Senate, June 22, 1983.

55/ For the need for increased OCR followup, see To Ensure Equal Educational Opportunity, pp. 83-84; FY 81 Operating Plan Comments, p. 1; FY 82 Operating Plan Comments, pp. 5-6; FY 83 Budget Report, p. 21.

56/ OCR FY 84 Budget, p. 275.

resulting from previous OCR investigations and 50 State agency plans for assuring civil rights compliance in vocational education. 57/ With so little staff time available, OCR did not systematically follow up on remedial plans in FY 82 or project such activity for FY 83. 58/ The proposed FY 84 budget alludes to remedial plan monitoring, but suggests resources not required to comply with court orders will be used for

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57/ FY 82 Operating Plan, p. 9902. Guidelines issued pursuant to the 1977 Adams order require a number of specific State agency activities to ensure Title VI, Title IX, and Section 504 compliance in vocational education programs receiving Federal funds. 34 C.F.R. Part 100 Appendix B, §II(B) (1982). OCR reports it is reviewing State agency activities regarding compliance with all three statutes but enforcing the guidelines only as regards Title VI because it believes Title IX and Section 504 regulations must be amended to authorize the State agency requirements in these areas. OCR Comments, p. 3. OCR has held this view since the guidelines were published in 1979. 44 Fed. Reg. 17163 (1979). It reports proposals to make the requisite regulatory changes but no expected publication date. OCR Comments, p. 3.

For the importance of holding State agencies accountable for ensuring civil rights compliance by the programs to which they distribute Federal funds, see U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. VI, To Extend Federal Financial Assistance, p. 809; To Ensure Equal Educational Opportunity, pp. 111, 384; and "Comments on Department of Health, Education, and Welfare Proposed Guidelines on Nondiscrimination in Vocational Education Programs," Feb. 7, 1979. For concerns about the small FY 82 resource allocation to monitoring State agency compliance and the possibility that resources might not be available for remedial plan monitoring, see FY 82 Operating Plan Comments, p. 6.

58/ Marcy Interview; FY 83 Operating Plan, p. 1792. The FY 83 Operating Plan refers to monitoring of court-ordered remedial plans, but not to plans OCR negotiated as a result of its own investigations.

technical assistance instead. 59/

Technical Assistance

Technical assistance to encourage voluntary civil rights compliance is a key component of OCR's enforcement program. 60/ Through regional technical assistance units and special projects carried out under contract, it has provided expert advice on resolving compliance problems and meeting requirements without undue costs. 61/ Despite the importance of this effort and its consistency with the

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59/ OCR FY 84 Budget, pp. 275-76. The basic description of OCR operations in the budget justification cites court-ordered monitoring and states, "In addition, the Office for Civil Rights monitors the plans of those whose efforts towards compliance with laws and court orders will be implemented over an extended period of time." Ibid., p. 275. The justification, however, also states that, under the proposed FY 84 budget, "OCR will have the resources to meet the basic requirements of the various court orders relating to the Office's operations and to undertake a sizable technical assistance program." Ibid., p. 276. There is no reference to monitoring not required by court orders. OCR's proposed FY 84 Operating Plan refers to such monitoring, but offers no indication it will not be more systematic than in the past. OCR, "Annual Operating Plan for Fiscal Year 1984," 48 Fed. Reg. 34095-96 (1983).

60/ OCR Implementation Plan, p. 7; FY 83 Operating Plan, p. 1792. OCR technical assistance efforts, focused mainly on Section 504, have included printed materials, workshops, onsite consultations and training sessions, and other communications designed to equip education institutions to comply with their civil rights obligations and inform protected groups of their rights. OCR Implementation Plan, p. 7. For the general importance of outreach to organizations that must comply with, and groups that are protected by, civil rights laws, see To Provide Fiscal Assistance, pp. 67-69; Enforcing Title IX, p. 41.

61/ For achievements in these areas, see, for example, OCR, Regional Technical Assistance Staff, "FY 82 Annual Report," (hereafter cited as Regional Technical Assistance Report).

administration's general enforcement philosophy, 62/ budget constraints consistently have narrowed OCR's technical assistance plans. 63/

In FY 81 OCR had approximately 21 professional staff in its regional technical assistance units. 64/ Contract funds supported a much larger effort, but only about two-thirds of what OCR originally planned. 65/ While regional technical

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62/ In civil rights and other areas, the administration has stressed increased reliance on State and local enforcement, a more conciliatory Federal approach, and "good faith" voluntary efforts to comply with the laws. U.S., Executive Office of the President, Office of Management and Budget, Special Analysis J: Civil Rights Activities, February 1982, pp. 5, 12-13. Technical assistance designed to enhance State and local civil rights capabilities and encourage institutions to resolve problems before they trigger an investigation is consistent with this orientation.

63/ For previous concerns about dwindling OCR technical assistance funds, see FY 83 Budget Report, pp. 18-21.

64/ Harry M. Singleton, Assistant Secretary for Civil Rights, letter to Kathryn Baer, civil rights analyst, U.S. Commission on Civil Rights, May 16, 1983, Enclosure B (hereafter cited as Singleton May 1983 Letter). The regional units were established to provide Section 504 technical assistance. In FY 82 they began extending their activities to Title VI and Title IX compliance issues. Ibid. The amount of training staff have received in such issues is unclear. OCR Comments, pp. 3-4.

65/ OCR originally budgeted $8.1 million for technical assistance in FY 81. Maurice Clifford, Director, Program Review and Assistance Service, OCR, interview, Mar. 5, 1982 (hereafter cited as Clifford Interview). This would have been the lowest expenditure since OCR began its technical assistance program. Technical Assistance Funding History. OCR figures on funds actually committed range between $4.8 million and just under $5.2 million. Clifford Interview; Harry M. Singleton, Assistant Secretary for Civil Rights, letter to Kathryn Baer, civil rights analyst, U.S. Commission on Civil Rights, Mar. 31, 1983 (hereafter cited as Singleton March 1983 Letter).

assistance staff increased somewhat in FY 82, 66/ funds for new technical assistance contracts shrank drastically. OCR ultimately had only 6.5 percent of the funds it originally expected, nearly 90 percent less than it actually committed the preceding year. 67/ Two-thirds of the technical assistance projects planned for FY 82 were cancelled. 68/ Others, including an initiative to improve State agency participation in resolving civil rights compliance problems, were scaled back substantially. 69/

For FY 83 OCR requested just under $1.4 million for technical assistance and again announced plans to focus on increasing State and local agency involvement. 70/ As of mid-August, 1983, however, OCR had not taken official steps

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66/ As of the end of FY 82, OCR had 31 professional staff assigned to its regional technical assistance units. Singleton, May 1983 Letter. During most of FY 82, however, 7 of the 10 regional units functioned with only 1 or 2 professionals. Regional Technical Assistance Report, p. 2.

67/ Original OCR plans were based on about $8 million for FY 82 technical assistance contracts. Clifford Interview. OCR actually committed $568,047. Singleton March 1983 Letter.

68/ Clifford Interview.

69/ Ibid. For further information on FY 82 cutbacks in OCR's technical assistance program, see FY 83 Budget Report, pp. 19-20.

70/ OCR, "Salaries and Expenses," undated (prepared for March 1982 appropriations hearings), p. 309; FY 83 Operating Plan, pp. 1791, 1793.

toward awarding new technical assistance contracts. 71/ Nor had regional technical assistance staff been increased to offset the loss of contract personnel. The units, in fact, had lost staff since the beginning of the year. 72/

OCR's proposed FY 84 budget reflects plans to rely mainly on staff for technical assistance and promises a "sizable" program. 73/ Since OCR, at best, will be able to maintain its present staffing level, how it could carry out these plans without curtailing other activities is unclear. 74/

71/ Before awarding contracts, OCR, like other Federal agencies, must request proposals from prospective contractors. No such request has been issued. The only technical assistance contract funds spent have been $15,000 shifted from OCR's account to a departmental contract for materials distribution. Thomas Esterly, Director, Program Review and Assistance Service, OCR, telephone interview, July 14, 1983 and telephone interview, Aug. 19, 1983 (hereafter cited as Esterly August interview). OCR reports 1 technical assistance initiative, using staff resources, in FY 83. This involved agreements to carry out cooperative activities concluded with 4 State agencies and under discussion with several others. OCR Comments, p. 4. Such agreements provide for exchanges of information. Singleton March 1983 Letter. OCR officials did not fully explain why the agreements were regarded as essentially technical assistance efforts. Standlee 1983 Interview.

72/ As of July 23, 1983, the regional units had 4 fewer professional staff than they had at the beginning of FY 83. OCR Comments, p. 4.

73/ OCR FY 84 Budget, p. 276.

74/ OCR has said it will use staff freed up by its decreasing complaint work load. FY 84 Appropriations Hearings, p. 1219 (testimony of Harry M. Singleton). Since approximately the same number of complaints are expected in FY 84 as in FY 83, it is unclear how OCR could have staff for a "sizable" technical assistance program and, at the same time, maintain progress in its compliance review effort.

Staff availability is not the only question these proposals raise. OCR, for example, has relatively few materials to supplement staff training or structure a formal technical assistance program. 75/ Lacking staff expertise to develop them, OCR has said it will use contractors. 76/ The proposed FY 84 budget, however, specifies no funds for technical assistance contracts. 77/ In technical assistance, therefore, as well as in other areas, OCR's ability to sustain, let alone increase, progress in its enforcement program without more than proposed FY 84 resources is doubtful.

75/ Standlee 1983 Interview. OCR has wanted to develop regional technical assistance resource collections but lacked the necessary funds. Thomas Esterly, telephone interview, Apr. 24, 1983.

76/ Standlee 1983 Interview; Singleton March 1983 Letter. OCR also plans to develop five technical assistance training packages in-house. Esterly August interview. According to the current schedule, however, none of these would be ready for use before the last quarter of FY 84. OCR Comments, p. 4.

77/ OCR said it expects to have approximately $600,000 for such contracts under the proposed FY 84 budget. FY 84 Appropriations Hearings, p. 1219 (testimony of Harry M. Singleton). This, however, would be inconsistent with the budget justification because it would be a substantial increase over actual spending in FY 83, whereas OCR's $2.8 million decrease in overall funding has been justified largely by savings to be realized in the technical assistance area. FY 84 Appropriations Hearings, pp. 1184, 1188 (testimony of Charles L. Heatherly).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS

Enforcement Responsibilities

The Department of Health and Human Services' Office for Civil Rights (OCR) is responsible for enforcing the prohibitions against race, sex, handicap, and age discrimination in Title VI of the Civil Rights Act of 1964, 1/ Title IX of the Education Amendments of 1972, 2/ section 504 of the Rehabilitation Act of 1973, 3/ and the Age Discrimination Act of 1975. 4/ It must ensure compliance with these laws by approximately 230,000 recipients of departmental funds, including hospitals, extended care facilities, various types of community health centers and clinics, health-related training programs, public assistance agencies, adoption agencies, foster

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1/ 42 U.S.C. §§2000d-2000d-6 (1976 & Supp. V 1981). Title VI prohibits discrimination on the basis of race, color, or national origin in any program receiving Federal financial assistance.

2/ 20 U.S.C. §§1681-1686 (1976). Title IX prohibits sex discrimination in federally-assisted education programs.

3/ 29 U.S.C. §794 (Supp. V 1981). Section 504 prohibits discrimination on the basis of handicap in all federally-assisted and federally-conducted programs.

4/ 42 U.S.C. §§6101-6107 (1976 & Supp. V 1981). The Age Discrimination Act prohibits discrimination because of age in programs receiving Federal financial aid.

care homes, day care and senior citizens centers, and nutrition programs. 5/ OCR also is responsible for enforcing civil rights requirements contained in a number of statutes authorizing specific assistance programs 6/ and in most of the health and human services block grants. 7/ It assists Health and Human Services offices that administer funds to incorporate civil right concerns in their program reviews. 8/

5/ U.S., Department of Health and Human Services, "Justification of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1984, Departmental Management, Office for Civil Rights," undated, p. 109 (hereafter cited as OCR FY 84 Budget).

6/ These specific provisions are found in the Public Telecommunications Financing Act of 1978, 47 U.S.C. §398 (Supp. V 1981), which prohibits employment discrimination in public broadcasting; the Public Health Service Act of 1970, 42 U.S.C. §292-d (1976), which prohibits sex discrimination in admissions to health training programs funded under the act; and Title VI of the Public Health Service Act, 42 U.S.C. §291c(e) (1976), which prohibits discrimination in health care services by facilities assisted under the Hill-Burton Act.

7/ In addition to the major civil rights laws cited above, there are specific provisions prohibiting discrimination because of race, color, national origin, sex, handicap, age, or religion in the block grants for preventive health services, alcohol and drug abuse and mental health, primary care, and maternal and child health services. 42 U.S.C. §§300w-7, 300x-7, 300y-9 and 42 U.S.C. §708 (Supp. V 1981). Discrimination on all these bases except religion also is prohibited in block grants for community services and low-income home energy assistance. 42 U.S.C. §8625 and 42 U.S.C. §9906 (Supp. V 1981).

8/ U.S., Department of Health and Human Services, Office of the Secretary, "Office for Civil Rights: Statement of Organization, Functions, and Delegation of Authority," 47 Fed. Reg. 20032-20034 (1982).

In addition, it is responsible for coordinating enforcement of the Age Discrimination Act by all Federal assistance agencies. 9/

The Commission previously has found that OCR lacked sufficient staff to meet these vast responsibilities. 10/ Since FY 80 OCR's staff resources have declined steadily, seriously undermining efforts to address long-neglected discriminatory patterns and practices. 11/ During the last

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9/ U.S., Department of Health and Human Services, Office for Civil Rights (hereafter OCR), "Annual Implementation Plan" undated (submitted to the Department of Justice pursuant to a request for plans by February 1982), p. 2 (hereafter cited as OCR Implmentation Plan). This responsibility originally was assigned by statute to the Secretary of Health, Education, and Welfare. 42 U.S.C. §6103(a) (1976 & Supp. V 1981).

10/ U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. VI, To Extend Federal Financial Assistance (1975), pp. 129-30 (hereafter cited as To Extend Federal Financial Assistance) and The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982), p. 23 (hereafter cited as FY 83 Budget Report).

11/ On reviewing an earlier draft of this chapter, OCR disagreed that lack of staff has undermined its enforcement capability, maintaining that it has new, more efficient methods for eliminating discrimination. Betty Lou Dotson, Director, OCR, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 7, 1983, p. 1 (hereafter cited as Dotson October Letter). It cited various examples, including expedited complaint resolution procedures and more narrowly focused reviews. Ibid.; Marcella Haynes, Chief, Special Projects Branch, OCR, telephone interview, Oct. 21, 1983 (hereafter cited as Haynes October Interview). As discussed later in this chapter, there are unresolved questions about the effectiveness of these initiatives. For examples of other OCR initiatives warranting further evaluation, see Betty Lou Dotson, Director, OCR, statement and information submitted for the record, Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1984, before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 98th Cong., 1st Sess. (1983), pp. 1218, 1227-28, 1230, 1236 (hereafter cited as Dotson Testimony).

year, these efforts have been further limited by agency enforcement policies. Resource constraints and policy problems also have combined to hinder OCR responses to demands and opportunities regarding State agency civil rights activities and coordination. These deficiencies generally would persist under the proposed FY 84 budget and OCR's operating plans, leaving the burden of combating many serious Federal civil rights violations to private individuals.

Budget Totals

For FY 81 over $21.9 million was requested for OCR to launch a strong enforcement effort in health and human services programs, 12/ a 10.4 percent increase over FY 80 funding for this purpose. As table 3 shows, OCR received only $19.7 million (10 percent less than it had in FY 80). Despite increases during the last 2 years, OCR still has not reached

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12/ Roma Stewart, Director, OCR, statements in Civil Rights Issues in Health Care Delivery, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Apr. 15-16, 1980, p. 39 (hereafter cited as Stewart Statements). This request was scaled back to $20.1 million after the current administration took office. Dotson October Letter, p. 2.

Table 3

OCR Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980 b/	$22,004
1981	19,770
1982	19,716
1983	21,513
1984 (request)	21,713

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a/ Figures represent what OCR could have spent during a whole fiscal year under each spending ceiling. Except for FY 82, they include $2,350,000 transferred from the Social Security trust fund. In FY 82, $2,256,000 was transferred from this fund.

b/ After the division of the Department of Health, Education and Welfare.

SOURCE: Betty Lou Dotson, Director, Office for Civil Rights, Department of Health and Human Services, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 7, 1983, p. 3.

the level it originally thought it needed to initiate an effective program. 13/

No formula has been developed to determine whether these increases have compensated for the long-range effects of inflation. Congressional Budget Office Gross National Product deflators, which are used in budget analyses, do not measure rising costs in the Federal sector precisely. 14/ They, nevertheless, may provide an approximation of trends in enforcement resources. With adjustments using the appropriate Congressional Budget Office formula, OCR would appear to have had about 20 percent less actual spending power in FY 83 than in FY 80. 15/

13/ The FY 81 request might not be a reliable measure of OCR's current needs. The agency is receiving fewer complaints than in FY 81 and has adopted expedited procedures for resolving some of them. OCR FY 84 Budget, p. 113; Dotson Testimony, p. 1221. OCR thus probably needs fewer staff for complaints processing. On the other hand, inflation since FY 81 might mean that more funds would be required for adequate staffing. OCR, moreover, was not certain the FY 81 request would support all the positions it needed to carry out its responsibilities. Stewart Statements, p. 49. OCR currently maintains that appropriations requests since FY 81 have accounted for inflation, salary increases, and changes in workload. Dotson October Letter, p. 2.

14/ For discussion of the use and limits of these formulas, see chapter 1.

15/ This estimate is derived by dividing OCR's appropriation by a factor that accounts for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 30, 1983 (hereafter cited as Zeller Interview).

The proposed FY 84 budget would provide $200,000 more for OCR than it had in FY 83. 16/ This slight increase still would not meet the FY 81 estimated need and might not even keep OCR's spending power at the current level. 17/ Adjusting for cumulative inflation rates with the appropriate Congressional Budget Office formula, OCR would have about 23 percent less spending power than in FY 80.

Staffing

As table 4 shows, OCR had 590 authorized staff positions in FY 80 when it faced the challenge of correcting longstanding deficiencies in health and human services civil rights enforcement. 18/ Although it needed at least 100 additional

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16/ OCR FY 84 Budget.

17/ The proposed FY 84 budget would represent a 1 percent increase over OCR's FY 83 appropriation. The Congressional Budget Office has projected a 4.7 percent inflation rate for FY 84. Zeller Interview. Although Federal sector costs may rise at different rates from costs in the economy overall, this discrepancy at least raises the possibility of a further loss in OCR spending power. OCR believes the limited increase in funding will support more civil rights activities than it carried out in FY 83 because it can achieve further efficiencies. Dotson October Letter, p. 3.

18/ Before the division of the Department of Health, Education, and Welfare in 1980, OCR focused most of its attention on education. Efforts to identify and correct discriminatory practices in health care and social service systems consequently were limited. Roma Stewart, Director, OCR, "Health Care and Civil Rights" (hereafter cited as Stewart Paper) in Civil Rights Issues in Health Care Delivery, p. 318; Stewart Statements, pp. 39-45. For examples of resulting deficiencies and OCR plans to improve enforcement see Sylvia Drew Ivie, Executive Director, National Health Law Program, "Ending Discrimination in Health Care: A Dream Deferred" in Civil Rights Issues in Health Care Delivery, pp. 312-16; Stewart Paper, pp. 318-26.

Table 4

OCR Full-Time, Permanent Staff Positions: FY 1980-84

Fiscal Year	Authorized a/	Actual b/
1980	590	527
1981	590	496
1982	524	477
1983	524	449 c/
1984 (Request)	509	

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a/ Number of full-time, permanent staff permitted under Congressional budget measures.

b/ Number of full time, permanent staff actually employed by OCR. Except as noted, figures are as of the end of the fiscal year.

c/ As of Sept. 30, 1983.

SOURCES: Betty Lou Dotson, Director, Office for Civil Rights, Department on Health and Human Services, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 7, 1983, p. 4 (for FY 80 - FY 84 authorized positions and FY 80 - FY 82 actual positions); Marcella Haynes, Chief, Special Projects Branch, Office for Civil Rights, Department of Health and Human Services, telephone interview, Oct. 21, 1983 (for FY 83 actual positions).

positions, 19/ it received none and, in fact, since has lost 66 positions. Moreover, OCR consistently has operated well below its authorized staffing strength. 20/ In FY 83 for example, it was more than 14 percent below its authorized level, 35 percent below the level it believed effective enforcement would require. 21/ Under the proposed FY 84 budget OCR would lose another 15 positions. 22/ Whether it would be able to operate at its authorized level is unclear. 23/

The proposed target of the staff reduction raises particular concerns. The legal services function, which conducts administrative proceedings to terminate funds and assists in preparing cases for litigation would bear the

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19/ Stewart Statements, pp. 44-45; Stewart Paper, p. 319; Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Birch Bayh, member, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Senate Committee on Appropriations, Sept. 16, 1980.

20/ Dotson October Letter, p. 3.

21/ OCR no longer maintains, as in FY 80, that 690 positions would be required for effective enforcement. According to the Director, the agency has undertaken a more effective compliance approach since 1981 and could sustain it with 509 positions. Dotson Testimony, pp. 1217-18. This approach is characterized in part by "more emphasis on compliance reviews." Ibid., p. 1217. With 690 positions, however, OCR planned more than twice the number of full-scale reviews it initiated in FY 83. Stewart Paper, p. 322.

22/ Dotson October Letter, p. 4.

23/ OCR could not specify the number of full-time permanent positions its proposed FY 84 budget would support. It reported it expected to use 469 "compensable workyears" and, in so doing, might have more than 469 full-time, permanent staff on board at any particular point in time. Dotson October Letter, p. 4; Haynes Oct. 21 Interview.

entire burden. 24/ This cutback in legal staff suggests OCR plans to develop fewer cases that would meet standards necessary for enforcement action, although it formerly believed it should take more such action to relieve the burden on private litigants. 25/

Complaints Processing

Before 1980 OCR had to concentrate on complaint investigations, thus limiting more effective compliance

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24/ OCR FY 84 Budget, p. 118. The legal services function also plays a role in developing regulations and supplementary interpretations of civil rights requirements and provides OCR with legal guidance. Ibid. The proposed budget would reduce this function from 55 to 40 positions. Ibid., p. 110.

25/ Stewart Statements p. 49. For the need for more fund termination proceedings, as well as litigation, see remarks of Philip R. Lee, Director, Health Policy Program, University of California, San Francisco and Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights in Civil Rights Issues in Health Care Delivery, pp. 12, 49-50. OCR has stated it now has less need for legal services because complaints have stabilized and because it is placing more emphasis on resolving them through mediation and on voluntary compliance efforts. OCR FY 84 Budget, p. 118. It also notes it has acquired more expertise in resolving compliance issues in health care and social services. Ibid. OCR maintains it will take enforcement action whenever such action is necessary. Dotson Testimony p. 1232; Dotson October Letter, p. 4. It, however, plans to conduct fewer investigations according to legal standards that must be followed in preparation for such action. Dotson Testimony, p. 1232.

reviews. 26/ Hopes of reversing this trend were frustrated 27/ apparently by declining staff resources and rising complaint receipts. In FY 80 and again in FY 81, OCR limited compliance reviews and, nevertheless, had increasing difficulty keeping up with incoming complaints. 28/ In FY 82 a sharp drop in

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26/ Stewart Paper, pp. 321-22. Before the creation of a separate Health and Human Services Department, OCR's emphasis on individual complaints resulted from a court order issued in Adams v. Califano. Ibid., p. 322. The order, issued in 1977, required OCR to eliminate its education complaints backlog and process all new education complaints within specific time frames. Though it also established time frames for compliance reviews of educational institutions, it did not require OCR to conduct a set number or establish any requirements for enforcement in health and human services programs. Adams v. Califano, No. 3095-70, and Women's Equity Action League v. Califano, No. 74-1720 (D.D.C. Dec. 29, 1977) (final order approving and incorporating settlement agreed to by the parties) at 4-5, 13-14, 15-18.

27/ For OCR's views that its reorganization in Health and Human Services would permit a shift in emphasis from complaints to compliance reviews see Stewart Paper, pp. 321-22. For continuing limitations in OCR's compliance review effort, see discussion below.

28/ OCR reported 1,776 complaints received and 1,581 complaint cases closed in FY 80. U.S., Department of Health and Human Services, "Justifications of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1982, Departmental Management, Office for Civil Rights," amended March 1981, p. 86; Dotson October Letter, p. 5. In FY 81, OCR received 1,704 and closed 1,538 complaints. OCR FY 84 Budget; U.S., Department of Health and Human Services, OCR, "Analysis of Closed Compliance Review and Complaint Investigation Cases," undated, p. 2 (hereafter cited as Analysis of Closed Cases). The General Accounting Office cited this trend toward resolving fewer complaints than were received as an indication OCR's complaints workload limited compliance reviews. Franklin A. Curtis, Associate Director, General Accounting Office, letter to Betty Lou Dotson, Director, OCR, Nov. 27, 1981, pp. 6-7.

complaint receipts alleviated these problems. 29/ OCR was able to reduce its inventory of open complaints and focus on older cases more difficult to resolve. 30/ As complaint receipts declined further in FY 83, OCR maintained its improved closure rate. 31/ Adoption of an expedited complaint resolution procedure also may have contributed to progress in this area. 32/

OCR expects to receive slightly more complaints in FY 84 than in FY 83 and believes it can process them and continue reducing its inventory without assigning additional

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29/ In FY 82 OCR expected to receive approximately 300 more complaints but in fact received 470 fewer complaints than in FY 81. OCR Implementation Plan, p. 11; OCR FY 84 Budget, p. 113.

30/ U.S., Department of Health and Human Services, "FY 1983 Implementation Plan Update," Attachment D, undated (hereafter cited as Implementation Plan Update); Analysis of Closed Cases, p. 2.

31/ OCR reports that as of September 9, 1983 it had received 1,023 and closed 1,057 complaints. Dotson October Letter, p. 5.

32/ OCR has adopted "early complaint resolution" procedures. Dotson Testimony, p. 1221. These procedures involve attempts to mediate settlements between parties to a complaint as an alternative to conducting a full-scale investigation. According to a study conducted for OCR, successful mediation saves staff resources, while unsuccessful mediation efforts add to the staff time complaint resolution requires. Project on Equal Education Rights, NOW Legal Defense and Education Fund, and SRI International, "The Settlement Solution: Assessing Mediation as a Tool in the Enforcement of Civil Rights," prepared under contract for OCR, October 1980, p. 60. As of early September, OCR had closed 110 complaints through mediation procedures in FY 83. Nathan Dick, Deputy Director, Office of Program Operations, OCR, telephone interview, Sept. 6, 1983. OCR does not have data needed to assess staff time saved through these procedures. Ibid.

staff. 33/ As discussed below, it nevertheless expects to begin fewer compliance reviews involving thorough, legally actionable investigations of widespread discriminatory patterns and practices than in former years when it had to commit more staff to complaints.

Compliance and Other Reviews

When OCR became responsible for civil rights enforcement solely in health and human services, it was aware of many serious, even life threatening compliance problems, including numerous policies denying minority and handicapped persons hospital in-patient treatment, emergency care, and access to nursing homes. 34/ Recognizing that compliance reviews are needed to address such problems effectively, OCR planned to

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33/ OCR FY 84 Budget, p. 113. OCR based its FY 84 complaint projection on the expectation it would receive 1,250 new complaints in FY 83. It later revised its FY 83 projection down to 1,105 complaint receipts. Ibid.; Willem H. van den Toorn, Director, Planning, Evaluation, and Budget Division, OCR, memorandum to Pamela Proctor, civil rights analyst, U.S. Commission on Civil Rights, Aug. 30, 1983. This may mean the FY 84 projection in the budget justification is too high.

34/ Stewart Paper, pp. 322-25. OCR believed that segregation in health care facilities and employment discrimination also were widespread. Ibid.

begin 257 such reviews in FY 80. 35/ It, however, fell far short of this goal and, without additional staff, abandoned it in FY 81. 36/ Declining complaint receipts and, perhaps, increased efficiency enabled OCR to make more progress in this area in FY 82. It began nearly 18 percent more compliance reviews than in FY 81, well over 5 times the number it projected. 37/ Even this expanded effort, however, covered fewer than 0.08 percent of health and human services facilities obliged to comply with Federal civil rights laws. 38/

35/ Ibid., p. 322. For Commission conclusions that compliance reviews are among the most effective enforcement tools see, for example, U.S., Commission on Civil Rights: Federal Civil Rights Enforcement Effort (1971), p. 215 (hereafter cited as 1971 Enforcement Report); The Federal Civil Rights Enforcement Effort--1974, vol. IV, To Provide Fiscal Assistance, p. 66 and vol. VI, To Extend Federal Financial Assistance, p. 188; Making Civil Rights Sense Out of Revenue Sharing Dollars (1975), pp. 59-61; Enforcing Title IX (1980), pp. 24, 39; Civil Rights: A National, Not a Special Interest (1981), p. 34 (hereafter cited as FY 82 Budget Statement); and FY 83 Budget Report, pp. 3-4, 65.

36/ OCR initated 129 compliance reviews in FY 80. Willem H. van der Toorn, Director, Planning, Evaluation, and Budget Division, OCR, memorandum to Pamela Proctor, civil rights analyst, U.S. Commission on Civil Rights, Sept. 20, 1983. OCR aimed for only 60 new compliance reviews in FY 81 but exceeded this goal, actually beginning 149 reviews. Implementation Plan Update.

37/ OCR initiated 181 compliance reviews in FY 82. Implementation Plan Update. Based on a projected rise in complaint receipts and loss of staff positions, OCR expected to begin 33 new reviews. U.S., Department of Health and Human Services, "Justificiations of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1983, Departmental Management, Office for Civil Rights." undated, p. 123.

38/ This percentage is based on OCR's current estimate of recipients subject to the laws it enforces. OCR FY 84 Budget, p. 109.

Although complaints declined again in FY 83 and expedited resolution procedures were adopted, OCR began fewer compliance reviews than in any year since FY 81. 39/ One factor in this decline may have been a decision to concentrate on closing reviews initiated in previous years. 40/ Another apparent factor, however, was OCR's decision to conserve scarce resources by initiating a new type of review, called the "project review." 41/

In project reviews, like compliance reviews, OCR initiates investigations of recipients with apparent compliance problems

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39/ In FY 83, OCR initiated 130 compliance reviews, 13 percent fewer than it began in FY 81 and 28 percent fewer than it began in FY 82. Haynes October Interview; Implementation Plan Update.

40/ In commenting on an earlier draft of this chapter, OCR said it was starting fewer new reviews because of efforts to close old reviews first and that closure rates had improved. It cited data indicating 65 percent more closures in FY 83 than in FY 82. Dotson October Letter, pp. 5-6. Figures for other years suggest FY 82 closures were unusually low, however. Haynes October Interview. OCR also suggested closures were a better performance measure than new reviews initiated. Dotson October Letter, p. 5. The Commission agrees closure rates are important because, to the extent they reflect corrective action agreements, they represent possible resolutions of civil rights problems. New reviews also are an important measure, however, since they ultimately affect the number of corrective actions OCR can obtain.

41/ OCR FY 84 Budget, p. 117; Nathan Dick, Deputy Director, Office of Program Operations, OCR, memorandum to Regional Directors, Jan. 10, 1983, attachment, pp. 1, 6 (hereafter cited as Project Review Directive). OCR considers project reviews a type of compliance review. Dotson Testimony, pp. 1232-33; Dotson October Letter, p. 6. It is more useful to collect and analyze data on these two efforts, separately, however, because, as discussed below, their potential for identifying and correcting serious civil rights violations differs significantly.

and, where it identifies violations, offers technical assistance and attempts to negotiate voluntary corrective action. 42/ Project reviews, however, are more limited than compliance reviews in several important respects. First, as developed to date, they are targeted on the basis of a survey covering only a few areas where substantive civil rights problems apparently exist. 43/ Even with more sources used for targeting, project reviews are designed to have a narrower scope and focus on less complex problems than compliance reviews. 44/ They, moreover, generally do not involve onsite

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42/ Project Review Directive.

43/ Reviews will be targeted initially on the basis of a hospital survey conducted in 1981. Project Review Directive, p. 2. Most of its questions concerned compliance with section 504 procedural requirements. Based on Commission staff review, the only substantive section 504 violations likely to be revealed are those regarding provisions for communicating with patients who have sensory impairments. The only Title VI violations that apparently could be targeted relate to discriminatory denials of emergency and in-patient services and failures to provide for adequate communications with language minority patients. See "1981 Short-Term, General, and Other Special Hospital Civil Rights Survey, OS/OCR Form 503;" Project Review Directive, pp. 2, 7-8. For pervasive problems that could not be targeted see Stewart Paper, pp. 322-26. Compliance reviews would be less limited by the survey than project reviews because many sources are used to target them. OCR Implementation Plan, p. 4. In FY 84 OCR plans to use reports on community service filed under Hill-Burton requirements as another source for targeting project reviews and notes that these involve substantive access issues. Project Review Directive; Dotson October Letter, p. 6.

44/ Dotson Testimony, p. 1233.

investigations that would uncover more extensive patterns of discrimination. 45/ They also do not result in formal findings of noncompliance 46/ and, thus, provide no basis for enforcement. 47/ In short, with project reviews OCR can

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45/ Ibid., p. 1234; Project Review Directive, p. 6. Of the 430 project reviews OCR initiated in FY 83, only 30 percent involved onsite investigations. Haynes October Interview. For the greater effectiveness of reviews involving onsite investigations as well as "desk audits" of reported data see 1971 Enforcement Report, p. 219. See also U.S., Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1984, Special Analyses, undated, pp. J-13, J-14.

46/ Dotson Testimony, p. 1233. OCR objected to this conclusion because, if a project review fails to obtain voluntary compliance, the recipient then will be subject to a conventional compliance review involving formal fact-finding procedures. Dotson October Letter, pp. 6-7. In such a case, however, the compliance review, not the project review triggering it, would be the source of enforceable findings.

47/ Dotson October Letter, p. 7.

cover more recipients but correct fewer serious civil rights violations than with compliance reviews. 48/

With plans to increase project reviews, OCR expects to begin only 97 compliance reviews in FY 84. 49/ This would represent a cutback of nearly 50 percent in its compliance

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48/ OCR has justified project reviews as a means to broaden coverage, expedite resolutions, and promote voluntary compliance. OCR FY 84 Budget, p. 117; Dotson Testimony, pp. 1233-34. Information available to date, however, raises questions about effectiveness warranting further research. For example, while OCR will reach more recipients with such reviews, it will deal with a relatively narrow range of substantive compliance problems. Ibid. The voluntary corrective actions it achieves, therefore, may not substantially increase equal opportunity. Project reviews, moreover, are being conducted at the expense of compliance reviews, and compliance reviews have a deterrent effect that promotes voluntary compliance. FY 82 Budget Statement, pp. 34, 41; FY 83 Budget Report, pp. 4, 65. It is questionable, therefore, whether project reviews will increase voluntary compliance with major civil rights requirements. OCR believes the high percentage of FY 83 project reviews resulting in corrective action indicates the effectiveness of this initiative. Dotson October Letter, pp. 7-8. In characterizing the results of these reviews, however, it cited only one type of action correcting a substantive civil rights violation. Haynes October Interview. The sheer number of project reviews producing change, therefore, does not seem an adequate measure of effectiveness. OCR also believes any type of review may have a deterrent effect and reports that project reviews have stimulated requests for assistance in achieving voluntary compliance from institutions other than those targeted. Ibid., p. 7.

49/ OCR FY 84 Budget, p. 116. To achieve this shift in emphasis, OCR proposed in FY 84 to transfer 44 of the 169 positions assigned to compliance reviews and monitoring to voluntary compliance and outreach, the function responsible for efforts to obtain corrective action in project reviews. Ibid., pp. 115, 117. According to this proposal, staffing for the compliance review function thus would be cut 26 percent. It is unclear why the proposal was made for FY 84 since the transfer was completed in FY 83. Haynes October Interview.

review effort. 50/ OCR's ability to address serious discrimination problems thus would be further limited by what appears a doubtful trade off between increased and effective activity. 51/

State Agency Compliance and Enforcement

The health and human services block grants established in 1981 enlarged and complicated OCR's enforcement responsibilities. As discussed at the beginning of this chapter, most of the block grants contain specific nondiscrimination provisions that restate major Federal civil rights protections, broaden some protections, 52/ and

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50/ This percentage is based on OCR's level of achievement in FY 82, before it began diverting staff to project reviews.

51/ OCR commented that an earlier draft of this chapter failed to consider the breadth of coverage afforded by project reviews and their usefulness in identifying problems that can be addressed only by full-scale compliance reviews. Dotson October Letter, p. 7. The Commission believes project reviews could be a useful supplement to an adequate compliance review effort since they would expand OCR's presence and provide a mechanism for resolving problems that may not require intensive investigation or complex remedies, as well as for identifying problems that do. The decision to shift substantial resources from compliance reviews to project reviews rather than seek additional resources for both is, in the Commission's view, a questionable policy decision.

52/ The specific nondiscrimination requirements broaden civil rights protections in that there are no general statutes prohibiting discrimination based on sex or religion in federally-assisted programs.

establish a specific State role in the enforcement process. 53/ OCR thus must establish procedures for enforcing the new provisions and involving the States. 54/ Under all the block grants, moreover, as in other health and human services funding programs, OCR must enforce States' responsibilities for ensuring civil rights compliance in the programs to which they distribute funds and, where necessary, enforce such compliance directly. 55/ This task is vitally important because large, relatively unrestricted Federal assistance programs historically have been particularly subject to civil rights abuses. 56/

53/ The nondiscrimination provisions require the Health and Human Services Department to notify State governors when it finds violations in the block grants they administer and give them 60 days to secure voluntary compliance. 42 U.S.C. §§300w-7(b), 300x-7(b), 300y-9(h), 42 U.S.C. §708(b), 42 U.S.C. §8625(b) and 42 U.S.C. §9906(b) (Supp. V 1981).

54/ For specific procedures required to implement the provisions effectively see John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Richard S. Schweiker, Secretary of Health and Human Services, Dec. 4, 1981 (hereafter cited as Block Grant Regulations Letter).

55/ The major civil rights laws OCR enforces cover all block grants, whether or not they contain specific nondiscrimination provisions. Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, memorandum to Michael Horowitz, Counsel to the Director, Office of Management and Budget, undated. Under these laws State agencies that receive Federal funds should ensure compliance by the ultimate recipients of these funds. Title VI regulations establish a specific requirement to this effect. See 28 C.F.R. §42.410 (1982) (Justice Department government-wide Title VI regulations).

56/ For civil rights problems in earlier assistance programs affording State and local agencies wide discretion and Commission concerns about the recurrence of such problems in the 1981 block grants see FY 82 Budget Statement, pp. 106-16; Block Grant Regulations Letter.

Although the health and human services block grants went into effect 2 years ago, OCR has not yet issued regulations implementing their civil rights requirements. 57/ Lacking regulations, OCR has not carried out its plans for compliance reviews focused on State agencies that administer block grant funds. 58/ While it again plans such reviews for FY 84, 59/ its ability to carry them out and to resolve pending complaints may continue to be hindered by delays in issuing the requisite regulations. 60/

57/ Marcella Haynes, Chief, Division of Policy and Special Projects Branch, OCR, telephone interview, Sept. 2, 1983 (hereafter cited as Haynes Sept. 2 Interview). OCR reports that procedures have been developed for block grant investigations and for involving governors' offices in resolving compliance problems. Dotson Testimony, p. 1236; Dotson October Letter, p. 8. The force of these procedures is unclear since they are not based on approved regulatory standards.

58/ OCR Implementation Plan; Dotson Testimony, pp. 1232, 1236. OCR reported it had modified its policy of deferring such reviews in instructions to regional offices on annual operating plans. Dotson October Letter, p. 9. The instructions, however, pertained to plans for FY 84 not FY 83. Haynes October Interview.

59/ OCR FY 84 Budget, p. 116.

60/ OCR sent draft regulations in February 1983 to the Justice Department and the Equal Employment Opportunity Commission (EEOC), which must approve them before they can be published. As of early September, there were unresolved differences of interpretation between OCR and EEOC, and the Justice Department had not communicated its views. Haynes Sept. 2 Interview. Since block grant regulations have not been approved, OCR has proceeded with compliance activities by using standards established in its regulations implementing major civil rights laws. Betty Lou Dotson, Director, OCR, memorandum to Regional Directors, Feb. 16, 1982; Dotson October Letter, p. 8. Enforcement based on such standards, however, must be limited because the major civil rights laws OCR administers do not cover all discriminatory policies and practices prohibited in block grant programs.

Civil rights compliance activities in block grants also have been hindered by inadequate resources. Since early FY 81, OCR has planned to test methods of involving States in complaint investigations and compliance reviews. 61/ It has had difficulty interesting States, however, because it has had no funds to compensate them for the extra efforts the project would entail. 62/ OCR has said it expects the project to be under way in FY 84, 63/ but under the proposed budget there still would be no funding for it.

Technical Assistance

Technical assistance to encourage voluntary civil rights compliance has been a key component of OCR's enforcement program since 1978 when regional units were established and substantial contract funds committed to assisting recipients, protected individuals, and other concerned groups in

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61/ Betty Lou Dotson, Director, OCR, memorandum to the Secretary, Dec. 18, 1981.

62/ Haynes Sept. 2 Interview. OCR reports that failure to complete this project has not diminished its capacity to ensure civil rights compliance in block grant programs. Dotson October Letter, p. 9. State activities that could supplement OCR's and, therefore, increase the total enforcement effort may have been limited, however.

63/ Marcella Haynes, Chief, Special Projects Branch, OCR, telephone interview, Sept. 15, 1983.

understanding section 504. [64] Despite OCR's increased emphasis on voluntary compliance with all the laws it enforces [65] and the agency's belief that many victims of discrimination do not know their rights or how to secure them, [66] resources for technical assistance have been severely limited. [67]

Since the end of FY 81, OCR has had no funds for new technical assistance contracts. [68] A substantial portion of funds left over from earlier years, moreover, were committed to section 504 technical assistance. 69/ OCR, therefore, has been unable to initiate comparable programs in other areas, such as Title VI, where increased awareness is needed. 70/ Under the proposed FY 84 budget, OCR again would have no funds for new technical assistance contracts, 71/ despite

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[64] Cynthia G. Brown, former Principal Deputy Director, OCR, Department of Health, Education, and Welfare, telephone interview, Sept. 22, 1983. Contract funds supported the development and dissemination of public information materials, compliance handbooks and models, workshops, hotlines and onsite visits to provide more individualized guidance, and other special projects. Regional technical assistance staff, on an ongoing basis, also met with groups of recipients and protected individuals and responded to requests for specific advice. Ibid.

[65] Dotson Testimony, p. 1217.

[66] OCR associates its declining complaint receipts with "a constituency which currently is generally uninformed about health and social services civil rights issues and protections." Implementation Plan Update.

[67] For previous Commission concerns about this problem see FY 83 Budget Report, p. 28. Reviewing an earlier draft of this chapter, OCR suggested the resource problem recently had been resolved by the transfer of 44 positions to the function principally responsible for technical assistance. Dotson October Letter, p. 10. As discussed below, it is unclear whether additional resources now are available for technical assistance activities except those related to project reviews.

[68] Steven Melov, budget analyst, Planning, Evaluation, and Budget Division, OCR, telephone interview, Sept. 22, 1983 (hereafter cited as Melov interview); Dotson October Letter, p. 10.

69/ Technical assistance plans developed in FY 81, for example, indicate that in that year 88 percent of the funds to provide recipients and beneficiaries with immediate technical assistance involved section 504 issues. Sylvia Drew Ivie, Director, OCR, memorandum to the Under Secretary, Jan. 14, 1981, attached "Initiative Statement Number 5" (hereafter cited as Ivie Memorandum). OCR now maintains that no more than 22 percent of FY 81 technical assistance contract funds related to section 504. Dotson October Letter, p. 10. Information requested to resolve this discrepancy was not received in time for inclusion in this report.

70/ For deficiencies in Title VI technical assistance relating to Department of Health, Education, and Welfare programs now in the Health and Human Services Department see U.S., General Accounting Office, Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI (1980), pp. 27, 29. In 1980, OCR believed Age Discrimination Act technical assistance also was needed, including efforts to inform protected individuals of their rights. Stewart Paper, p. 327. OCR awarded only 4 relatively small Age Discrimination Act contracts, however. Ivie Memorandum. In FY 82, models for providing public information on civil rights requirements, including the Age Discrimination Act, were developed under contract. These, however, are intended for State agency, not OCR, use. U.S., Department of Health and Human Services, Report to the Congress on the Implementation of the Age Discrimination Act of 1975 During Fiscal Year 1982, As Required by Section 308(b) of the Age Discrimination Act of 1975, As Amended (March 1983), p. 4 (hereafter cited as Age Discrimination Act Annual Report).

71/ Melov Interview. OCR objected to an earlier draft of this discussion for over-emphasizing lost contract funds and cited considerable technical assistance activity by staff. Dotson October Letter, pp. 9-10. Further research would be required to determine whether staff activities adequately substitute for those formerly supported by contracts.

outstanding and possibly increasing needs. 72/

Regional technical assistance staff have increased, though possibly not enough to offset the loss of contract personnel. In FY 80, OCR lost most of these staff to the new Education Department and, as a result, had operating technical assistance units in only 3 of its 10 regions in FY 81 and FY 82. 73/ In FY 83, all 10 regions again had units providing technical assistance, 74/ and the overall staffing level was considerably

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72/ Technical assistance in the past has been keyed to the publication of new regulations. OCR, for example, initiated section 504 technical assistance when it published its regulations because it believed compliance requirements otherwise might not be fully understood. James Bennett, branch chief, Voluntary Compliance and Outreach Division, OCR, interview, Apr. 7, 1983 (hereafter cited as Bennett Interview). OCR recently published Age Discrimination Act regulations and expects to issue block grant regulations "in the near future." Dotson Testimony, pp. 1232, 1236. It plans to provide training in compliance with the block grant regulations. Ibid. It also reports technical assistance regarding its Age Discrimination Act regulations but no specific projects in this area. Dotson October Letter, p. 10.

73/ Ivie Memorandum; U.S., Department of Health and Human Services, report submitted under OMB Circular No. A-11-53 (data on civil rights activities) for the FY 84 budget cycle, undated (hereafter cited as OCR A-11-53 Report).

74/ Bennett Interview. As reconstituted, these units have broader responsibilities for voluntary compliance and outreach efforts. Willem H. van den Toorn, Director, Planning, Evaluation, and Budget Division, OCR, memorandum to Pamela Proctor, civil rights analyst, U.S. Commission on Civil Rights, July 20, 1983 (hereafter cited as Van den Toorn July Memorandum).

higher. 75/

OCR's justification for this increase, however, indicates new staff will be used for negotiating corrective actions resulting from project reviews not technical assistance that would encourage recipients to resolve civil rights problems before an investigation became necessary or to increase protected individuals' awareness of their rights. 76/ The proposal thus would not address some major deficiencies in OCR's technical assistance program. 77/

Coordination

Since 1978, OCR has been responsible for coordinating enforcement of the Age Discrimination Act. 78/ It

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75/ In July 1983, OCR reported a 37-position increase for voluntary compliance and outreach in FY 83 and an additional projected increase of 44 positions in FY 84. Van den Toorn July Memorandum, attachment. OCR now reports that the 44-position transfer proposed for FY 84 was completed in FY 83. Dotson October Letter, p. 10; Haynes October interview.

76/ Dotson Testimony, p. 1235; Dotson October Letter, p. 11. Although project reviews involve the units responsible for voluntary compliance and outreach, they are a type of investigation. Ibid., p. 1233. Commenting on an earlier draft of this chapter, OCR noted that project reviews have a particular technical assistance component but did not explain how it differs substantially from technical assistance provided in the course of other types of investigations. Dotson October Letter, p. 11.

77/ Project reviews will enable OCR to reach more recipients. Dotson Testimony, p. 1235; Dotson October Letter, p. 7. As discussed above, however, they will focus on a narrow range of substantive compliance problems. FY 84 plans, moreover, provide for as few as 40 project reviews targeted to Title VI problems and no such reviews for possible violations of the Age Discrimination Act. Dotson October Letter, p. 11.

specifically is required to ensure consistency among agencies required to publish regulations and report annually to Congress on implementation of the act. 79/ To some extent, OCR's ability to fulfill these responsibilities effectively and carry out plans for more vigorous leadership has been hindered by policy problems beyond its control. Scarce resources, however, would appear a more persistent limiting factor. 80/

OCR proposed Age Discrimination Act regulations for programs assisted by the Health and Human Services Department in September 1979. 81/ Apparently expecting to publish final regulations shortly thereafter, it planned to develop supplementary policies and procedures and, in FY 81, to begin

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78/ OCR Implementation Plan, p. 2. Coordination responsibilities carried out by OCR were assigned by statute to the Secretary of Health, Education, and Welfare. 42 U.S.C. §6103(a)(1976 & Supp. V 1981).

79/ 42 U.S.C. §§6103(a)(4), 6106a (Supp. V. 1981). For Commission recommendations that Congress establish these responsibilities to ensure that State and local public and private agencies are not subject to inconsistent requirements see U.S., Commission on Civil Rights, The Age Discrimination Study (1977), pp. 45-46, 49.

80/ In FY 82 and FY 83, OCR had the equivalent of only 1 professional staff member for coordination. OCR A-11-53 report; Dotson October Letter, p. 11. Commenting on an earlier draft of this chapter, OCR objected to the suggestion it lacked adequate coordination resources and cited staff involvement in a number of Age Discrimination Act activities. Dotson October Letter, pp. 11-12. Many of these, however, relate to OCR's responsibilities for enforcing the act in health and human services programs rather than to responsibilities for coordinating enforcement by all Federal assistance agencies.

81/ 44 Fed. Reg. 55108 (1979).

age discrimination compliance reviews. 82/ With such enforcement experience, it expected to identify needs for further policy interpretations and possibly revisions in Age Discrimination Act regulations. 83/ The Office of Management and Budget, however, objected to OCR's proposed regulations. Conflicting views between the agencies ultimately delayed final publication until December 1982. 84/ In the interim, OCR delayed final approval of other agencies' regulations 85/ and deferred or scaled back planned activities such as

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82/ Stewart Paper, pp. 326-27.

83/ Ibid., p. 326. OCR referred specifically to experience gained through processing Age Discrimination Act complaints, but presumably expected to benefit from experience with compliance reviews as well.

84/ 47 Fed. Reg. 57850 (1982). Consistent with the government-wide regulations, OCR's proposed regulations included a requirement that recipients evaluate their compliance with the act and correct any violations they identify. Compare 44 Fed. Reg. 55108, 55116, proposed §91.33 (1979) with 45 C.F.R. §90.43(b) (1982). This requirement has been found useful in promoting voluntary compliance. Paul T. Hill and Richard Rettig, Mechanisms for the Implementation of Civil Rights Guarantees by Education Institutions (Palo Alto, Calif.: Rand Center for Research on Education Finance and Governance, 1980). The Office of Management and Budget refused to approve the requirement on the grounds it would impose an unwarranted paperwork burden. Age Discrimination Act Annual Report, p. 3. OCR ultimately substituted a self-evaluation requirement that could be imposed in the context of an investigation. 47 Fed. Reg. 57850, 57860, proposed §91.33 (1982). This would not serve the same voluntary compliance function as the previous requirement.

85/ Age Discrimination Act Annual Report, p. 3. The self-evaluation issue would have been raised by these regulations, as well as OCR's, to the extent agencies had followed the government-wide regulations, as required.

compliance reviews. 86/

Pending resolution of this policy difference, OCR could have carried out other coordination activities. For example, OCR could have followed up with the many agencies that have not attempted to identify patterns and practices of age discrimination. It apparently instead accepted their rationale that compliance reviews are unnecessary because they receive no complaints. 87/

Effective coordination seems unlikely under the proposed FY 84 budget. As in the past, OCR expects to have the equivalent of only 1 professional staff in this area. 88/ With this minimal commitment, the agency may be able to keep up with

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86/ OCR conducted 1 age discrimination compliance review in FY 82. Ibid., p. 5.

87/ Ibid., p. 6. For the Commission's view that the absence of complaints does not indicate nondiscrimination see U.S., Commission on Civil Rights, To Know Or Not to Know (1973), p. 61. OCR states its first priority has been to work with agencies to ensure publication of final regulations. Dotson October Letter, p. 12. With additional staff, however, it could carry out other activities simultaneously. OCR also cites activities carried out during the time approval of regulations was suspended, specifically an evaluation of the mediation process and a project to develop model outreach plans for State units on aging. Ibid. OCR, however, did not play a significant role in the former activity. Kathleen O'Brien, equal opportunity specialist, Division of Policy and Special Projects, OCR, telephone interview, Oct. 24, 1983. Since the models were not designed for use by other Federal agencies, the relation of the latter activity to coordination is unclear.

88/ OCR A-11-53 Report. In commenting on an earlier draft of this chapter, OCR indicated that additional staff time would be used for Age Discrimination Act activities but did not clearly distinguish between departmental enforcement and government-wide coordination functions. Dotson October Letter, p. 13.

requests for reviews of regulations and technical assistance, 89/ but probably not carry out additional leadership tasks.

Resource plans in other areas also would limit OCR's leadership in Age Discrimination Act enforcement. With fewer resources for compliance reviews, for example, OCR seems unlikely to set a good example for other agencies that should be investigating patterns and practices of age discrimination or to develop the experience necessary to assess current enforcement policies effectively. 90/ Increased technical assistance to familiarize recipients and protected individuals

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89/ Agencies were required to publish proposed regulations within 90 days of the issuance of government-wide regulations and to submit final regulations for OCR review within the next 120 days. 45 C.F.R. §90.31 (b), (c) (1982). The government-wide regulations were published in June 1979. 44 Fed. Reg. 33768 (1979). Only 4 agencies have published final regulations, however. Age Discrimination Act Annual Report, p. 2. OCR comments on an earlier draft of this chapter indicated a further delay in approving other agencies' regulations pending the resolution of a suit contesting the validity of departures from the government-wide regulations. Dotson October Letter, p. 13. It thus is unclear at what point OCR will have a substantial number of regulations to approve and increased technical assistance requests from other agencies implementing the Age Discrimination Act. The case is Action Alliance of Senior Citizens v. Schweiker, No. 83-0285 (D.D.C. filed Feb. 2, 1983).

90/ OCR's ability to identify patterns and practices of age discrimination and needs for further work on policies and procedures also may be limited by inadequate information collection. OCR reports no survey of age discrimination and plans no such survey in FY 84. Dotson Testimony, p. 1235; OCR FY 84 Budget, p. 111. The agency uses other sources to target compliance problems. Dotson Testimony, p. 1235; Dotson October Letter, p. 13. The Commission, however, does not believe these are an effective substitute for surveys presenting a clear overall picture of possible civil rights violations.

with its relatively new regulations also seems doubtful. Without more resources and renewed commitments, longstanding deficiencies affecting vital human needs seem likely to persist in OCR's enforcement program.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

Enforcement Responsibilities

The Office of Fair Housing and Equal Opportunity (FHEO) of the Department of Housing and Urban Development (HUD) has the lead responsibility for Federal enforcement of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act. 1/ Title VIII prohibits discrimination in the sale or rental of most housing in the United States. 2/ HUD's responsibility for processing and investigating complaints under the Federal fair housing law is specified under Title VIII. 3/

FHEO also enforces in HUD programs the civil rights provisions contained in Title VI of the Civil Rights Act of

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1/ 42 U.S.C. §§3601-3619 (1976 & Supp. V 1981). Title VIII prohibits, with certain exceptions, discrimination on the basis of race, color, religion, sex, or national origin in the financing, brokerage, sale or rental of residential property. *Id.* §§3604-3606. FHEO also administers Executive Order 11,063, as amended, which in part directs Federal agencies to take action to prohibit discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of housing assisted by Federal funds, guarantees, or insurance. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963 Comp.), *reprinted in* 42 U.S.C. §1982 app. at 1217-17 (1976), as amended by Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. §3608 app. at 816-818 (Supp. V 1981).

2/ 42 U.S.C. §§3604-3606 (1976).

3/ 42 U.S.C. §3610 (1976).

1964, 4/ section 504 of the Rehabilitation Act of 1973, 5/ and the Age Discrimination Act of 1975. 6/ FHEO also administers several other nondiscrimination provisions contained in program legislation: for example, section 109 of the Housing and Community Development Act of 1974, requires nondiscrimination in HUD funded local block grant programs. 7/ Further, under Executive Order 12,259, FHEO is responsible for leading and coordinating the administration of all Federal activities relating to housing and urban development to promote the goal of fair housing. 8/

FHEO has been marked over many years by weaknesses in its enforcement efforts due to the lack of resources needed for a

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4/ 42 U.S.C. §2000d-2000d-6 (1976 & Supp. V 1981). Title VI prohibits discrimination based on race, color, or national origin in programs or activities receiving Federal assistance. *Id*. §2000d.

5/ 29 U.S.C. §§794 (1976 & Supp. V. 1981). Section 504 prohibits discrimination on the basis of handicap in all federally assisted and federally conducted programs.

6/ 42 U.S.C. §§6101-6107 (1976 & Supp. V 1981). The Age Discrimination Act bars discrimination because of age in programs and activities receiving Federal financial assistance. *Id*. §6102.

7/ 42 U.S.C. §5309 (1976 & Supp. V 1981). Section 109 bars discrimination based on race, color, national origin, sex, age, and handicap funded under community development block grant programs.

8/ Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. §3608 app. at 816-818 (Supp. V 1981).

strong and reliable compliance program. 9/ During FY 83 FHEO civil rights activities continued to be hampered by inadequate staff levels, a problem likely to persist under the FY 84 budget. As a result, FHEO will continue to have difficulty protecting individual housing rights and preventing discrimination in HUD programs. Without effective enforcement efforts, HUD lacks the credibility to promote and gain voluntary civil rights compliance in the Nation's housing markets, a stated objective of Reagan Administration civil rights policy. 10/

9/ U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. II: To Provide...For Fair Housing (1974), pp. 14, 38 (hereafter cited as 1974 Fair Housing Report); Twenty Years After Brown (1977) p. 126; and The Federal Fair Housing Enforcement Effort (1979), pp. 16-19, 232, 235 (hereafter cited as 1979 Fair Housing Report); and Chester C. McGuire, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, letter to Henry Eschwege, Director, Community and Economic Development Division, U.S. General Accounting Office, Oct. 31, 1977, attachment: pp. 2, 3, 5; Patricia Roberts Harris, Secretary of Housing and Urban Development, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Mar. 2, 1979. The Commission has found Federal fair housing enforcement to be undermined both by weak provisions in Title VIII and by inadequate budgetary resources for investigation and compliance activities. 1979 Fair Housing Report, pp. 230-32.

10/ The administration has forwarded to the 98th Congress proposed legislation to strengthen Title VIII enforcement. Fair Housing Legislation: Message to the Congress Transmitting Proposed Legislation, 19 WEEKLY COMP. OF PRES. DOC 991 (July 12, 1983). The legislation supported by the administration, S. 1612 and H.R. 3747, joined two other bills, S. 1220 and H.R. 3482, that had been introduced earlier in the 98th Congress to strengthen Title VIII. The Commission commented on the above bills in October 1983. See Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Senator Charles McC. Mathias, Oct. 6, 1983 (transmitting staff analysis of legislation to strengthen Title VIII).

Budget Totals

As table 5 shows, funding for the Office of Fair Housing and Equal Opportunity has increased each year between FY 80 and FY 83. Inflation, however, has limited the impact of this increase on FHEO compliance activities. One means of measuring the impact of inflation on FHEO spending power is through the use of Gross National Product deflators supplied by the Congressional Budget Office (CBO). Although these deflators are not specifically geared to measure rising costs in Federal civil rights enforcement activities, 11/ they may provide an approximate measure of enforcement resources, including FHEO's.

The FY 84 budget appropriation for FHEO is $28,675,000, an amount $287,000 less than the FY 83 budget level. 12/ After adjusting for inflation with the CBO formula, it appears that the real spending power of FHEO in FY 84 would be only marginally greater (about 1 percent) than in FY 80. 13/

11/ For discussion of the use and limits of these measures, see chapter 1.

12/ FHEO's FY 84 budget was approved at the same level requested. Craig White, budget analyst, Office of Administration, Department of Housing and Urban Development (hereafter HUD), telephone interview, Nov. 1, 1983.

13/ In FY 83 FHEO's spending power was about 6 percent more than in FY 80 after adjustment for inflation. These estimates are derived by dividing the FHEO appropriation by a factor that accounts for annual inflation rates since 1980. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 20, 1983.

Table 5

FHEO Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980	$22,060
1981	26,726
1982	27,304
1983	28,962
1984	28,675

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a/ Figures represent what FHEO could have spent during the entire fiscal year under each spending ceiling.

SOURCES: U.S., Department of Housing and Urban Development: Congressional Justification for 1982 Estimates (March 1981), pp. R-1, S-1 (for FY 80 appropriation); Congressional Justification for 1983 Estimates (March 1982), pp. P-1, Q-1 (for FY 81 appropriation); Congressional Justification for 1984 Estimates (March 1983), attachment III, p. 1; attachment IV, p. 1 (for FY 82 and FY 83 appropriations); and Craig White, budget analyst, Office of Administration, Department of Housing and Urban Development, telephone interview, Nov. 1, 1983 (for FY 84 appropriation).

Staffing

The Commission has found in the past that staffing and appropriations for FHEO have been insufficient to carry out the multiplicity of civil rights responsibilities for fair housing leadership that are assigned to HUD. 14/ In the late 1970s, FHEO had fewer than 500 staff assigned to duties at HUD headquarters, 10 regional offices, and 41 area offices. 15/

After two sharply critical studies of FHEO performance were released in 1978-79, 16/ HUD began to seek substantially higher staffing for its civil rights activities. In FY 80, the FHEO staff was increased by more than 13.8 percent to fill 552 positions. 17/ In FY 81, HUD initially sought to increase the FHEO staffing authorization by 23.6 percent to 682 positions as part of a comprehensive strategy to improve the unit's

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14/ 1979 Fair Housing Report, pp. 16, 17.

15/ Ibid., p. 15. See also HUD: The HUD Budget: Fiscal Year 1979 (Summary) (January 1978), p. FHEO-1; The HUD Budget: Fiscal Year 1980 (Summary) (January 1979), p. FHEO-1; and Budget: Fiscal Year 1981 (Summary) (January 1980), p. FHEO-1 (hereafter cited as FY 81 HUD Budget).

16/ 1979 Fair Housing Report, pp. 5-56, 230-35; and U.S., General Accounting Office, Stronger Federal Enforcement Needed to Uphold Fair Housing Laws (Feb. 2, 1978), pp. 4-29 (hereafter cited as GAO Report).

17/ See figures in FY 81 HUD Budget, p. FHEO-1; and HUD, FY 1982 Budget (Summary) (January 1981), FHEO-1 (hereafter cited as FY 82 HUD Budget).

performance. 18/ This figure subsequently was revised downward by the new administration, 19/ and FHEO staff filled only 610 positions in FY 81. 20/ As table 6 indicates, FHEO staffing has been declining since.

The staff of FHEO totaled 576 positions in FY 82, 438 in the field and 138 at headquarters. 21/ FHEO headquarters staff manages critical enforcement functions such as planning, evaluation, and the direction of FHEO field staff. The loss of even a limited number of headquarters staff positions can result in less effective HUD civil rights performance.

A reduction in force carried out by HUD during early FY 83 eliminated 16 (about 11.6 percent of the total) FHEO headquarters positions. 22/ The FHEO office responsible for overseeing Title VIII enforcement lost 4 of its 23 positions. 23/ The professional staff assigned to systemic Title VIII investigations affecting multiple complainants was

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18/ FY 81 HUD Budget, pp. FHEO-1, 2.

19/ Justification for 1982 Estimates, p. S-1.

20/ HUD, Congressional Justification for 1983 Estimates (March 1982) p. Q-6 (hereafter cited as Justification for 1983 Estimates).

21/ U.S., HUD, Congressional Justification for 1984 Estimates, (March 1983), Attachment IV, p. 6 (hereafter cited as Justification for 1984 Estimates).

22/ Ibid. and Nokama Smith, budget officer, Office of Management and Field Coordination, FHEO, HUD, interview, May 17, 1983 (hereafter cited as Smith May Interview).

23/ Justification for 1984 Estimates, p. 7, 8-9 and Justification for 1983 Estimates, p. Q-7, Q-9.

Table 6

FHEO Full-Time, Permanent Staff Positions: FY 80-84

Fiscal Year	Authorized a/	Actual b/
1980	560	552
1981	590	610
1982	569	576
1983	558	545 c/
1984	558	---

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a/ Number of full-time, permanent staff permitted under Congressional budget measures.

b/ Number of full-time, permanent staff actually employed by FHEO. Except as noted, figures are for the last day of each fiscal year.

c/ As of June 30, 1983.

SOURCES: U.S., Department of Housing and Urban Development: Congressional Justification for 1982 Estimates (March 1981), p. S-1 (for FY 80 actual staff); Congressional Justification for 1983 Estimates (March 1982), p. Q-1 (for FY 81 actual staff); Congressional Justification for 1984 Estimates (March 1983), attachment IV, p. 1 (for FY 82 actual staff); and Nokama Smith, budget officer, Office of Management and Field Coordination, FHEO, HUD, telephone interview, Aug. 3, 1983 (for FY 83 actual staff) and interview, May 17, 1983 (for FY 80 - FY 84 authorized staff).

cut from 4 to 2. 24/ The office responsible for compliance activities under Title VI and other authorities, lost more than 20 percent of its staff. 25/ Total FHEO headquarters staffing dropped to 119 during FY 83. 26/

Complaint Processing

Since FY 81, delays and backlogs in the handling of civil rights complaints have become a problem in FHEO operations. The Commission previously has noted that delays in HUD investigations can lead to a decline in willingness of the public to file complaints, permit discriminatory conduct to persist, and result in less successful FHEO investigative efforts. 27/

24/ Katrina Ross, Director, Fair Housing Enforcement Division, FHEO, HUD, interview, May 26, 1983 (hereafter cited as Ross May Interview). One of the lost systemic positions was restored by reassignment of other FHEO staff. This action, however, required time-consuming reorientation of the reassigned staff member. Ibid.

25/ Justification for 1984 Estimates, attachment IV, p. 7, and Smith May Interview.

26/ Nokama Smith, budget officer, Office of Management and Field Coordination, FHEO, HUD, telephone interview, Aug. 3, 1983 (hereafter cited as Smith August Interview). The figure cited is for FHEO staffing as of June 30, 1983. HUD points out that despite these figures, fair housing staffing and funding have been treated "more favorably" than staffing and funding at the Department overall. Antonio Monroig, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 19, 1983, p. 2 (hereafter cited as Monroig Letter and Enclosures).

27/ 1979 Fair Housing Report, pp. 29, 37.

The ability of FHEO to avoid delays and backlogs in complaint handling remains a matter of concern because Title VIII complaints to HUD are projected to continue at the current level of about 5,000 annually. 28/ Complaints of discrimination in HUD assisted programs are expected by HUD to increase substantially in FY 83 and FY 84. 29/

Backlogs of Title VIII cases open more than 90 days 30/ increased in both FY 81 and 82, and at the end of the first 6 months of FY 83 the backlog stood at 865 complaints. 31/ In FY 80, the backlog of the Title VIII cases had totaled only 35. 32/ These backlogs developed even as the number of

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28/ Justification for 1984 Estimates, attachment IV, p. 14.

29/ Ibid., p. 15.

30/ Title VIII complaints that are open more than 90 days are considered to be backlogged. Ibid., p. 14. HUD believes the number of Title VIII complaints "over 90 days old" should be assessed in light of the fact that Title VIII requires termination of efforts by the HUD Secretary to obtain voluntary compliance "only when a Federal Court trial in a civil suit is brought by an individual." Monroig Letter and Enclosures, p. 5. HUD did not indicate the extent to which such efforts may have contributed to the recent growth of backlogged Title VIII cases.

31/ Ross May Interview. (Data received during interview are cited hereafter as FHEO Title VIII Data). The Title VIII backlog in FY 81 stood at 209; in FY 82 the backlog was 987 cases. Figures from Justification for 1983 Estimates, p. Q-16; and Justification for 1984 Estimates, attachment IV, p. 14.

32/ Justification for 1982 Estimates, p. S-21.

successful conciliations of Title VIII cases were increasing. 33/

At the end of the first half of FY 83, 54 percent of all open fair housing complaints were more than 90 days old. 34/ Moreover, one-quarter of all open Title VIII complaints were more than 180 days old. 35/ Such delays in resolving complaints are of particular concern because the time limits for the investigative phase of Title VIII complaints calls for prompt action. 36/ Further, private suits under Title VIII must "be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred," 37/

33/ FHEO Title VIII Data. HUD cited the increase in successful conciliations as an indicator of more effective Title VIII enforcement. Monroig Letter and Enclosures, p. 1. HUD also cited monetary compensation awards that are "higher than ever" as a result of successful conciliations. Ibid. Review by Commission staff, however, of FHEO Title VIII data could not confirm this second point, nor did HUD provide supportive data on its comments on this chapter when in draft form.

34/ Calculated from FHEO/HUD Complaint and Compliance Review System Report EO2BBCA, "Title VIII and EO 11063 Complaint Aging Report" (through Mar. 31, 1983), p. 1.

35/ Ibid.

36/ HUD is required by Title VIII to complete Title VIII investigations within 30 days of the filing of complaints with HUD. 42 U.S.C. §3610(a) (1976). This 30-day limitation applies only to FHEO investigations or reactivation of complaints after previous referral to a State or local agency with fair housing responsibilities. Id. §3610(c), 24 C.F.R. §105.21(a) (1983). HUD currently requires State and local agencies to investigate "the average complaint" and "set [the complaint] for conciliation, within 30-45 days." 24 C.F.R. §115.2(c) (1983).

37/ 42 U.S.C. §3612(a) (1976).

a requirement that is less likely to be met by complainants who have not received administrative determination regarding their complaint. 38/

FHEO closures of Title VI and section 109 complaints during FY 82 did not keep pace with the increase in the number of these complaints. 39/ As a result, the number of open complaints on hand at the end of the fiscal year rose by 17 percent. 40/ During the first 6 months of FY 83, the number of open Title VI and section 109 complaints on hand increased significantly. 41/ For the same period, more than one-fourth of all open Title VI and section 109 complaints had been in that status for more than 180 days, 42/ indicating, as in earlier years, that delays continued to hamper FHEO

38/ HUD states that to protect individual rights it notifies complainants of their right to file a private suit within the required time limits of Title VIII regardless of whether HUD has completed its investigation. Monroig Letter and Enclosures, p. 5.

39/ Justification for 1984 Estimates, attachment IV, p. 15.

40/ Ibid. and Justification for 1983 Estimates, p. Q-17.

41/ HUD/FHEO Complaint and Compliance Review System Reports EO2CAC-A and EO2ANC-A, "Status Summary of Complaints" (Oct. 1, 1982 to Mar. 31, 1983), p. 4.

42/ Calculated from HUD/FHEO Complaint and Compliance Review System Report EO2BBCE, "Section 109 Complaint Aging Report" (through Mar. 31, 1983), p. 1; and EO2BBCC, "Title VI Complaint Aging Report" (through Mar. 31, 1983), p. 1.

enforcement action on complaints of discrimination in HUD-assisted programs. 43/

HUD reduced the staff time in FY 83 and FY 84 allocated to complaint processing and investigation. 44/ This action negatively affects both investigation of fair housing complaints and of possible discrimination in HUD programs.

HUD estimated its personnel would close about 2,300 Title VIII complaints a year in both FY 83 and FY 84. 45/ This would approximate the number of Title VIII closures in FY 82. 46/ Yet, the reduction in the FHEO staff time allocated to Title VIII complaint handling in both years by HUD 47/ would likely result in about 150 to 225 fewer complaint closures annually 48/ and would limit the capacity of FHEO to reduce

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43/ 1979 Fair Housing Report, pp. 37-38. FHEO states that it seeks to close complaints of possible discrimination in HUD-funded program activities in less than 180 days but is not required to do so. HUD regulations for Title VI specify only that investigations shall be "prompt." 24 C.F.R. §1.7(c)(1983) and Waite Madison, supervisory equal opportunity specialist, Program Compliance Division, FHEO, HUD, telephone interview, July 28, 1983 (hereafter cited as Madison Interview).

44/ Justification for 1984 Estimates, attachment IV, pp. 14-15.

45/ Ibid., p. 14.

46/ Ibid.

47/ Ibid. The reductions would amount to about 7 fewer staff years for Title VIII complaint processing in both FY 83 and FY 84. Ibid.

48/ Ibid.

its existing large backlog of Title VIII complaints. 49/ HUD itself estimated that a backlog of 500 Title VIII complaints will continue during FY 83 and FY 84. 50/

For investigation and processing of complaints of discrimination in its programs in FY 83 and 84, HUD allocated 19 percent fewer staff years than in FY 82. 51/ In spite of these reductions, HUD estimated that in both FY 83 and FY 84

49/ FHEO staff stated that the planned issuance of a new field operations handbook in FY 83 and planned training for field staff in Title VIII complaint handling procedures could increase Title VIII activity by regional staff, thus enhancing the quality and quantity of Title VIII investigative results without increasing staff levels. Ross May Interview; Harry Carey, Acting Director, Office of Fair Housing Enforcement, FHEO/HUD, interview, June 1, 1983; and Katrina Ross, Director, Fair Housing Enforcement Division, FHEO, HUD, interview, June 1, 1983 (hereafter cited as Ross June Interview). FHEO, however, also indicated that it would not act to issue Title VIII regulations providing a comprehensive interpretation and definition of prohibited conduct under Title VIII for the use of HUD staff, the public, and the courts. HUD stated that it would defer issuance of Title VIII regulations until efforts to amend the Fair Housing Act in Congress were completed. Peter Kaplan, Director, Office of Program Standards and Evaluation, FHEO, HUD, interview, June 3, 1983 (hereafter cited as Kaplan June Interview).

50/ Justification for 1984 Estimates, attachment IV, p. 14. The backlog of Title VIII complaints is composed of unresolved cases referred by HUD to States and local agencies for handling and of cases retained by HUD for its own action.

51/ Justification for 1982 Estimates, attachment IV, p. 15. This discussion includes FHEO program non-discrimination responsibilities under Title VI, section 109, the Age Discrimination Act, section 504, and equal employment opportunity contract clauses involved in HUD-assisted activities. Ibid.

FHEO would close substantially increased numbers of program discrimination complaints. 52/ The level of staff hours allocated by HUD to meet its complaint closure objectives, however, appeared to be 52 percent too low for FY 83 53/ and 88 percent too low for FY 84, when measured against the past performance of FHEO. 54/

FHEO staff believe that improved staff efficiency and use of a detailed program complaint investigation manual now under preparation should increase effective use of its regional staff

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52/ Ibid., p. 15. HUD projects that the number of program discrimination complaints will increase by about 23 percent in FY 83 and by the same percentage again in FY 84. Ibid. One reason for an increased number of complaints is the scheduled issuance in FY 84 of HUD regulations under section 504; these are expected to result in a major increase in section 504 complaints. Robert Ardinger, program analyst, Program Compliance Division, FHEO, HUD, interview, June 15, 1983.

53/ Calculated from FY 82 performance and staff years. Justification for 84 Estimates, attachment IV, p. 15. In FY 83, 21.5 staff years would be needed for HUD's estimate of 389 closures of complaints of program discrimination. HUD has allocated only 14.1 staff years for FY 83.

54/ Ibid. In FY 84, about 26.5 staff years would be required for HUD's estimate of 480 closures of complaints. HUD has allocated 14.1 staff years for FY 84.

investigators. 55/ Nonetheless, it appears unlikely that the efficiency of FHEO investigations can be improved to achieve the number of complaint closures that HUD has estimated for FY 83 and FY 84. If receipts of program discrimination complaints increased to the levels FHEO projected for FY 83 and FY 84, delays in investigations and backlogs of these complaints are likely to be continuing problems. 56/

55/ Laurence D. Pearl, Director, Office of HUD Program Compliance, FHEO, HUD, interview, May 27, 1983 (hereafter cited as Pearl May 27 Interview) and Madison Interview. FHEO stated that staff would also receive training in statistical analysis techniques and investigative procedures during FY 83 that would improve staff effectiveness. HUD stated that its investigations of Title VI and section 109 complaints of discrimination already has "become considerably more effective in identifying and correcting discriminatory practices." HUD stated that its findings of apparent noncompliance rose from 10 percent of the complaints investigated in FY 81, to 14 percent in FY 82, and to 24 percent in FY 83. Monroig Letter and Enclosures, p. 7. HUD did not discuss how these percentages were determined. Nonetheless, the improvement in the percentage of investigations leading to findings of noncompliance appears also to have been accompanied by a decline in the number of complaints being closed, when compared with FY 82 performance. HUD/FHEO Complaint and Compliance Review System, "Title VI: Status Summary of Complaints" (through Mar. 31, 1983) (EO2ANC-A), p. 2; and Justification for 1984 Estimates, attachment IV, p. 15.

56/ According to HUD, the number of Title VI and section 109 complaints remaining on hand at the end of FY 84 will equal almost 52 percent of the total number of receipts of these complaints during that year. Justification for 1984 Estimates, attachment IV, p. 15. Complaints carried over from the prior fiscal year combine with new receipts during the current year to form the total annual workload for staff. When complaints are carried over in substantial numbers from 1 fiscal year to another without staff increases to compensate for this added workload, a backlog is likely to develop.

Fair Housing Assistance to State and Local Agencies

HUD is required under the Civil Rights Act of 1968 to refer Title VIII complaints to State and local agencies administering fair housing laws that provide "rights and remedies... substantially equivalent" to those under Title VIII. [57] Since 1980, FHEO has provided financial assistance to State and local civil rights agencies to support the investigation of Title VIII complaints referred to them by HUD. [58] Funds provided by FHEO's Fair Housing Assistance Program (FHAP) have encouraged State and local jurisdictions to adopt "equivalent" fair housing laws and to accept complaint referrals. [59] During FY 82, more than half of all Title VIII complaints received by HUD were referred to State and local agencies for investigation. [60]

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[57] 42 U.S.C. §3601(c) (1976), 24 C.F.R. §115.6 (1983).

[58] Steven Sacks, Director, Federal, State and Local Programs Division, FHEO, HUD, interview, May 18, 1983 (hereafter cited as Sacks Interview).

[59] Justification for 1984 Estimates, attachment III, p. 3, 6-7.

[60] Ibid., attachment III, p. 7. In 1980, only 13.5 percent of HUD's Title VIII complaints were referred. Ibid.

Since 1980, HUD has sought a $3.7 million annual appropriation for FHAP aid to State and local agencies. 61/ In FY 84, the number of State and local agencies assisted by the program will have increased to an estimated 90 agencies. 62/ Referral of growing numbers of individual fair housing complaints to State and local agencies potentially allows FHEO to increase its staff time devoted to broader Title VIII investigations that have a greater enforcement effect and that can lead to Department of Justice prosecutions. 63/

It is not clear that HUD can rely increasingly on the results of State and local investigation and conciliation

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61/ Sacks Interview. FHEO staff characterized the current allocation for FHAP as "programmatically adequate" to fund annually the total number of agencies that have sought FHAP support. In fact, actual outlays for FHAP aid to State and local agencies between FY 80 and FY 82 were substantially below the annual appropriations during these years, due to delays in program implementation. As a result, a substantial carryover developed of funds appropriated for FHAP. Thus, in FY 83, FHEO estimated that obligations of FHAP aid to State and local agencies would total $6,747,000, an amount almost double the FY 83 appropriation for the program. Justification for 1984 Estimates, attachment III, p. 1. When the funds carried over from earlier appropriations are exhausted, considerably reduced funds will be available for FHAP assistance to State and local agencies.

62/ Sacks Interview.

63/ FHEO investigation of systemic Title VIII complaints is discussed in greater detail beginning at p. 24.

activities. 64/ Almost two-thirds of all backlogged HUD Title VIII cases in early 1983 were of complaints that HUD had referred to State and local agencies. 65/ Further, a detailed program audit this year of FHEO performance in 1 HUD regional office found monitoring of State and local agencies to be

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64/ The referral of Title VIII complaints to State and local agencies for investigation and enforcement action does not end HUD's responsibility for prompt handling of such complaints. The HUD Secretary retains the right to recall referred complaints upon certification that "the protection of the rights of the parties or the interests of justice require such action." 42 U.S.C. §3610(c) (1976). HUD regulations state that "such certification [and complaint recall] shall be made routinely when the State and local agency has not commenced proceedings within 30 days following the referral of the complaint to it, or...has not carried forth such proceedings with reasonable promptness within the judgment of the Assistant Secretary." 24 C.F.R. §105.20 (1983).

65/ FHEO Title VIII Data. The percentage of complaints backlogged at State and local agencies (66 percent) exceeded the percentage of Title VIII complaints referred to these agencies (61 percent) suggesting their complaint resolution activities are less timely than HUD's.

"inadequate." 66/ Also, Title VIII conciliation agreements gained by State and local agencies are obtaining monetary awards for complainants that average 90 percent less than those HUD obtains in its conciliations. 67/

The headquarters FHEO staff administering the FHAP State and local program has been limited to 5 or fewer positions

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66/ Lee M. Stevens, Region V Inspector General for Audit, HUD Audit Report to Alfred C. Moran, Acting Regional Administrator, Region V, Audit Case No. 83-CH-174-0004, "Housing Discrimination Complaint Investigation," Region V, Jan. 14, 1983, p. 2 (hereafter cited as Housing Discrimination Complaint Investigation). The audit determined that one reason for this "inadequate" monitoring was the unreliability of FHEO data processing systems. Ibid., pp. 19, 20, 24, 27, 30. The audit found that the computer program needed for monitoring State and local agencies was never designed at headquarters because FHEO funds "ran out before the program could be developed." Ibid., p. 30. It is not clear when an adequate system will be in place. In commenting on this chapter, in draft, HUD reported, "In FY 1983 considerable activity occurred in the redesign of FHEO's ADP monitoring capability for State and local complaint processing. HUD's Office of Administration has committed resources in FY 1984 to implement these ADP improvements." Monroig Letter and Enclosures: Technical Corrections, p. 1. HUD did not indicate the level of resources to be committed in FY 84 to ADP improvements or the nature of these improvements.

67/ FHEO Title VIII Data. Monetary awards under successful conciliations by HUD averaged $1,144, while State and local agencies gained only an average of $118 in successful conciliations. HUD staff also were more likely to achieve Title VIII conciliations that included followup agreements. (Not all "successful" conciliations include followup agreements.) HUD observed, however, that efforts by State and local agencies to achieve early resolution of complaints (e.g., to obtain a unit of housing for complainants) may account for their lower average monetary awards in conciliations. HUD also believes that public hearings at the State and local level may result in gains in monetary relief that are not reported as having been achieved pursuant to conciliation efforts. Monroig Letter and Enclosures, p. 6.

since its inception. 68/ This staff must carry out time-consuming responsibilities for certifying Title VIII equivalency, conducting training and technical assistance, reviewing funding proposals, administering contracts and memoranda of understanding, and assisting regional staff in monitoring State and local handling of complaints. 69/ While emphasizing rapid implementation of FHAP funding for State and local agencies, FHEO has not made continuous evaluation of the performance of these agencies a priority. Staff charged with oversight of the program thus have not been able to determine any problems may be occurring in the complaint performance of the referral agencies. 70/ Nonetheless, FHEO Assistant Secretary Monroig believes that the program to strengthen State and local fair housing enforcement has been a success and "has increased dramatically the resources which are available to fight housing discrimination." 71/

68/ Sacks Interview.

69/ Ibid.

70/ Ibid. FHEO recently emphasized to its regional staff that careful monitoring of the "timeliness of State and local agency processing" of complaints should be achieved through continuation of the currently required 30/60/90 day series of progress checks on handling of individual complaints. Monroig Letter and Enclosures: Memorandum on Title VIII Recall Policy, Aug. 3, 1983.

71/ Monroig Letter and Enclosures, p. 1. The Assistant Secretary observed, "Many states and localities have laws stronger than Title VIII, thus increasing [by means of HUD referrals] the remedies available to victims of discrimination." Ibid.

The State and local agencies handling Title VIII complaints are outside HUD's immediate control and day-to-day oversight Therefore, effective management of the FHAP program requires that staff be assigned to a continuing program of evaluation and early problem resolution. The FY 84 HUD budget, however, will not increase headquarters staffing for the FHAP State and local program, 72/ and no clear committment has been made regarding plans for training of regional staff on FHAP matters during FY 84. 73/ Without increased staffing and training during FY 84, FHEO will lack the means to correct problems in the performance of State and local agencies on Title VIII complaints. 74/

72/ Ibid.

73/ It was not until April 1982 that HUD provided comprehensive training sessions for each regional office on the State and local referral program and FHAP, 2 years after the program's inception. Additional training appears to be all the more important because for both FY 83 and FY 84 HUD indicated that a considerably increased amount of regional office FHEO staff time would be devoted to "FHAP Activity." Justification for 1984 Estimates, attachment IV, p. 14. HUD stated that Regional Title VIII staff would receive training in late FY 83 on monitoring the complaint processing procedures of State and local referral agencies. HUD also noted that "sufficient funds will be available for a FHAP training session in FY 84." Monroig Letter and Enclosures: Technical Corrections, p. 1.

74/ FHEO staff believe a "systematic complaints monitoring" effort planned for FY 84, a new FHEO field operations handbook, and training of field staff should help to improve HUD regional office performance on monitoring of complaint handling by State and local agencies. Ross May and June Interviews; Justification for 1984 Estimates, attachment IV, p. 9; and Monroig Letter and Enclosures: Technical Corrections, p. 1.

Systemic Activities

In addition to its action on individual complaints, FHEO investigates broader pattern and practice discrimination in housing and in HUD programs. 75/ This is usually referred to as systemic activity. A single pattern and practice case under Title VIII often can include multiple complaints against a single respondent. 76/

The Assistant Secretary for Fair Housing has emphasized the importance of systemic complaint investigation and stated that increased FHEO activity on these cases would be likely to increase HUD referrals of Title VIII complaints to the Department of Justice (DOJ) for possible litigation. 77/ The Attorney General is limited to litigation of "pattern and practice" Title VIII cases or to cases which raise "an issue of general public importance involving a group of persons." 78/ The prosecution of substantial numbers of Title VIII cases is

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75/ HUD, FY 1984 Budget (January 1983) (Summary), p. FHEO-2 (hereafter cited as FY 84 HUD Budget).

76/ Harry Carey, Acting Director, Office of Fair Housing Enforcement, FHEO, HUD, telephone interview, June 29, 1983.

77/ Antonio Monroig, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, Testimony before the Subcommittee on HUD-Independent Agencies of the House Committee on Appropriations, Apr. 13-14, 1983 (hereafter cited as Monroig Testimony); Ross May Interview. HUD can resolve Title VIII complaints only through conciliation and persuasion. 42 U.S.C. §3601(a) (1976).

78/ 42 U.S.C. §3613 (1976).

critical to Federal Government efforts to curb housing discrimination. 79/ Persons who would violate Title VIII have little incentive to comply voluntarily with the Fair Housing Act when the possibility of Federal Title VIII litigation is unlikely. 80/

HUD's processing of thousands of Title VIII complaints each year potentially provides an opportunity for the agency to uncover and forward to DOJ substantial numbers of pattern and practices cases for possible litigation. In the past, however, the Commission found that HUD has referred only a very small number of its total annual Title VIII cases to DOJ for possible prosecution. 81/ Coordination and information sharing between the two agencies also were marked by problems. 82/ Such weaknesses have persisted.

79/ 1979 Fair Housing Report, pp. 62, 71-72.

80/ Ibid., p. 230.

81/ Ibid., pp. 31-32.

82/ Ibid., pp. 64, 69.

HUD reported that it referred three pattern and practice Title VIII cases to DOJ during FY 82. 83/ Delays of a year or more by FHEO between investigations of Title VIII complaints and their referral to DOJ also have lessened the possibility of swift litigation by the Department. 84/ Coordination of activities between HUD and DOJ still appeared to be a problem in 1983. 85/

The low number of Title VIII pattern and practice case referrals appears to result from the inadequate staff time and

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83/ Monroig Letter and Enclosures: Technical Corrections, p. 1. The Department of Justice, however, reported only two such referrals by HUD during FY 82. Thomas M. Keeling, Acting Chief, General Litigation Section, for William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to James S. Arisman, civil rights analyst, U.S. Commission on Civil Rights, June 22, 1983 (hereafter cited as Keeling Letter). In FY 81, HUD referred 4 pattern and practice matters for possible prosecution. In 1980, no pattern or practices cases were referred. Additionally, FHEO has also referred to DOJ an annual average of 20 other Title VIII cases that are not pattern or practice matters and that apparently are provided only for DOJ's appraisal and general information. Ibid.

84/ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to Antonio Monroig, Assistant Secretary for Fair Housing, HUD, Jan. 18, 1983 (hereafter cited as Reynolds Letter). The Assistant Attorney General's letter stressed that delays in HUD's referral of Title VIII complaints to DOJ had resulted in the need for reinvestigation of cases and made it difficult to locate witnesses. Ibid. The letter was written following reported expressions of concern by the Assistant Secretary regarding apparent inaction by DOJ on Title VIII case referrals. "HUD's Approach to Housing Bias Stresses Cooperation Over Litigation," Washington Post, Jan. 4, 1983, p. A-13.

85/ Reynolds Letter.

resources allocated by FHEO to its systemic Title VIII efforts. An effective program of pattern and practice investigations requires exacting headquarters coordination and monitoring of specially trained staffs of investigators, technicians, and analysts. 86/ In both FY 81 and FY 82, FHEO allocated about 32 staff years for the investigation of systemic Title VIII cases. 87/ In FY 81, FHEO closed 360 systemic Title VIII complaints and referred 4 of them to Justice for possible pattern and practice litigation. 88/ In FY 82, FHEO closed 246 systemic complaints. 89/

In FY 83 and FY 84, HUD allocated 33.3 staff years for systemic Title VIII investigations but predicted it would achieve major increases in the number of cases it would

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86/ Budget: Fiscal Year 1981 (January 1980), p. FHEO-2; and 1980 Annual Report (September 1981), pp. 16-17 (hereafter cited as HUD 1980 Annual Report).

87/ Justification for 1983 Estimates, p. Q-16; and Justification for 1984 Estimates, attachment IV, p. 14.

88/ Justification for 1983 Estimates, p. Q-16; and Keeling Letter.

89/ Justification for 1984 Estimates, attachment IV, p. 14. As noted, DOJ states that HUD referred 2 pattern and practice cases during FY 82. Keeling Letter. HUD states that 3 such referrals were made during FY 82. Monroig Letter and Enclosures: Technical Corrections, p. 1.

close. 90/ FHEO estimated it would close 765 systemic cases in FY 83 and 995 cases in FY 84. 91/ During the first half of FY 83, FHEO closed only 134 such cases, 92/ indicating that the major increase in systemic activity projected by HUD had not occurred. 93/

Based on FHEO performance during FY 82, a total of 101 staff years would be required to achieve HUD's goal for pattern and practice Title VIII closures in FY 83. 94/ In FY 84, 131 staff years would be needed. 95/ FHEO's allocation of 33 staff years for systemic investigations in FY 83 and FY 84 96/

90/ Justification for 1984 Estimates, attachment IV, p. 14. FHEO emphasizes that Title VIII systemic complaint investigations are a "priority" and that referral of pattern and practice cases to the Justice Department for civil action is a "primary objective" for FHEO. FHEO added that it would "advise Regional offices...to provide for prompt processing of cases which have systemic issues" and would expedite referral of cases to DOJ for initiation of civil actions. Monroig Letter and Enclosures, p. 6.

91/ Justification for 1984 Estimates, attachment IV, p. 14. According to HUD, the number of systemic Title VIII complaint closures would triple in FY 83 and quadruple in FY 84 when measured against FY 82 performance. Ibid.

92/ Ross May Interview.

93/ On reviewing a draft of this chapter, HUD disagreed with this conclusion, asserting that "the number of cases involving systemic issues is increasing." HUD stated that it had 346 systemic cases "on hand" at the end of the first 6 months of FY 83 and planned to resolve 66 of these. Monroig Letter and Enclosures, p. 6.

94/ Ross May Interview. Calculated from HUD figures.

95/ Ibid. Calculated from HUD figures.

96/ Justification for 1984 Estimates, attachment IV, p. 14.

does not provide the staff needed to achieve its own enforcement objectives. The limited staffing for systemic Title VIII complaint activity also is likely to impede referrals of substantially increased numbers of pattern and practice cases to the Department of Justice for possible litigation.

Program Compliance Reviews

Compliance reviews by FHEO of local HUD-assisted program activities under Title VI, section 109 and other authorities offer a systematic means of uncovering unlawful discrimination and acting promptly to correct civil rights violations. FHEO currently concentrates its compliance reviews on community development block grant recipients and on local public housing authorities. 97/

Program compliance reviews also offer HUD the opportunity to act administratively against housing discrimination and segregation affecting large numbers of units of federally

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97/ U.S., Department of Housing and Urban Development, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, "FY 1982 Implementation Plan for Civil Rights Programs Covered by Executive Order 12250" (March 1982), p. 26, (hereafter cited as HUD Implementation Plan for Civil Rights Programs); Pearl May 27 Interview. The FY 1983 HUD Implementation Plan had not been submitted formally to the Department of Justice at the time this analysis was prepared and, therefore, was not available to Commission staff for review.

assisted housing at the local level. 98/ HUD's potential for results in this area is considerable: the agency's 2 largest housing assistance programs involve 2.7 million units of low-income housing. 99/

FHEO compliance reviews of HUD-assisted program activities have been marked by serious performance problems in the past, and their potential impact has been diminished. The Commission found in the late 1970s that FHEO was performing annually only a small number of Title VI reviews relative to its total number of program recipients, 100/ and the General Accounting Office found that many HUD program recipients had "virtually no chance of being reviewed." 101/ Inadequate staffing for compliance reviews also was cited by HUD and the Department of Justice

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98/ HUD is empowered to seek compliance in Title VIII complaints only through voluntary conciliation. 42 U.S.C. §3610(a) (1976). In contrast, HUD has greater power in cases involving discrimination and segregation in federally-assisted housing in violation of Title VI of the Civil Rights Act of 1964. In these cases, administrative tools such as deferrals of funding, termination or reduction of funding, or imposition of required corrective actions for continued assistance can be brought to bear. Historically, however, HUD has been reluctant to exercise administrative procedures that would result in the interruption of funding of local programs. See 1979 Fair Housing Report, pp. 38-39.

99/ HUD, Programs of HUD (October 1982), pp. 26-27.

100/ 1979 Fair Housing Report, pp. 16-17, 38. The Commission found that HUD compliance reviews had not reached 2 percent of the recipients of HUD program recipients in any single fiscal year as of late 1977. Ibid., p. 38.

101/ GAO Report, pp. 14-15.

as the basis for the small number of reviews performed. 102/

HUD began to examine in 1979 the level of staffing increases that would be required to mount "a more extensive and effective compliance review program." 103/ Between FY 80 and FY 81 the authorized FHEO headquarters staffing for program compliance activities increased from 23 to 29 positions. 104/ At the same time, regional staff years for Title VI and section 109 program compliance reviews were increased by 20 percent. 105/ HUD also established a Headquarters Investigative Unit to handle program discrimination complaints

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102/ Chester C. McGuire, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, attachment to letter to Henry Eschwege, Director, Community and Economic Development Division, General Accounting Office, Oct. 31, 1977, pp. 2-3, citing U.S., Department of Justice, Civil Rights Division, "Interagency Survey Report" (September 1977).

103/ U.S., Department of Housing and Urban Development and U.S., Department of Justice, Civil Rights Division, Memorandum of Understanding: Regarding the Enforcement of Title VI of the Civil Rights Act of 1964 (June 18, 1979 and July 6, 1979) (hereafter cited as HUD and DOJ Memorandum of Understanding).

104/ Calculated from figures in Justification for 1982 Estimates, p. S-8; and Justification for 1983 Estimates, p. Q-10.

105/ Justification for 1982 Estimates, p. S-23; and Justification for 1983 Estimates, p. Q-17. The staff years rose from 40.8 to 49.1 years.

and compliance reviews under Title VI and section 109 that required highly developed statistical and analytical skills. 106/

These staffing gains were not sustained. The special compliance team was disbanded in 1981 because its travel costs were considered too high in light of the limited FHEO travel budget 107/ and because the team "would have required a far greater expenditure of staff than had been contemplated, at a time of increasingly scarce resources." 108/ Moreover, in FY 82 HUD reduced most of the increased regional staff years for compliance reviews that had been added in FY 81. 109/

106/ Justification for 1982 Estimates, p. S-14; HUD 1980 Annual Report, p. 17; and FY 81 HUD Budget, p. FHEO-3.

107/ Laurence D. Pearl, Director, Office of HUD Program Compliance, telephone interview, May 25, 1983. The Commission repeatedly has recommended that HUD carry out a program of reviews similar to those that were to be undertaken by this team. The Commission has called for at least 50 such reviews a year to determine the civil rights status of local agencies and activities receiving HUD assistance. See 1974 Fair Housing Report, p. 346; Twenty Years After Brown, p. 176; 1979 Fair Housing Report, pp. 34-35.

108/ Monroig Letter and Enclosures, p. 8.

109/ Justification for 1984 Estimates, Attachment IV, p. 16 and Justification for 1983 Estimates, p. Q-17.

In FY 82 the number of reported FHEO program compliance reviews declined. 110/ Most important, the actual number of compliance reviews conducted during FY 82 fell 33 percent short of the number of reviews that FHEO had set as its objective for the year. 111/ The number of compliance reviews performed in FY 82 was only 2 percent of HUD program recipients. 112/ In

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110/ Ibid. Reported compliance reviews decreased from 549 in FY 81 to 279 in FY 82. FHEO indicates, however, that in FY 82 it changed the manner in which it counted these reviews. It said its previous procedures had "resulted, in some cases, in...double counting." Subsequent elimination of this double counting resulted in an "apparent reduction" in the number of compliance reviews conducted during FY 82. Monroig Letter and Enclosures, p. 7. Commission staff were unable to determine the degree to which this practice may have distorted prior data on compliance reviews conducted annually by FHEO. HUD also said that the reduced number of compliance reviews reflects new FHEO "work measurement standards" that require field staff to carry out more compliance reviews of larger recipients of HUD funding. It contended that any decline in the total number of annual reviews was balanced by increased HUD attention to recipients whose activities affect more persons. Pearl May 27 Interview.

111/ Justification for 1983 Estimates, p. Q-17 and Justification for 1984 Estimates, attachment IV, p. 15.

112/ Calculated from Justification for 1984 Estimates, attachment IV, p. 16 and HUD, Office of Fair Housing and Equal Opportunity, "A-11-53 Submission, Federal Civil Rights Program Classification Schedule, All Agency Civil Rights Programs for FY 1984, to the Office of Management and Budget" (Oct. 25, 1982). Calculated based on 279 compliance reviews and 13,500 total recipients. In FY 80 and FY 81, the number of compliance reviews reported by FHEO would have represented almost 4 percent of the total number of recipients of HUD program assistance. Calculated from data in Justification for 1983 Estimates, p. Q-17 and Justification for 1982 Estimates, p. S-23, based on 14,000 total recipients. As noted above, however, previous double counting of compliance reviews by FHEO limits the reliability of the figures for FY 80 and FY 81.

the first 6 months of FY 1983, FHEO completed only 89 compliance reviews. 113/

FHEO set a goal of 362 program compliance reviews each year for both FY 83 and FY 84. 114/ Achievement of this goal would require a 30 percent improvement over the actual number of compliance reviews completed in FY 82. 115/ The 42.4 staff years allocated for FY 84 FHEO program compliance review activity is far lower than appears necessary to achieve the increase in reviews projected. 116/ Without substantially higher staffing for compliance activities, it appears unlikely

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113/ HUD/FHEO Complaint and Compliance Review System Report EO2AHC-A, "Summary of Compliance Reviews Conducted by Program" (Oct. 1, 1982-Mar. 31, 1983), pp. 1-2.

114/ Justification for 1984 Estimates, attachment IV, p. 16.

115/ Calculated from data in Justification for 1984 Estimates, attachment IV, p. 16.

116/ About 55 staff years would be needed, based on FY 82 performance. Ibid. FHEO's annual level of performance on compliance reviews is affected by the fact that such reviews are lengthy and take substantial time to resolve. At the end of the first 6 months of FY 83, more than 54 percent of all Title VI reviews and 46 percent of all section 109 reviews had been open for more than 180 days. HUD/FHEO Complaint and Compliance Review System Report EO2BBCD, "Title VI Compliance Review Aging Report" (through Mar. 31, 1983) p. 1; and EO2BBCF, "Section 109 Compliance Review Aging Report" (through Mar. 31, 1983).

that FHEO can achieve the goals it established for FY 83 and FY 84. 117/

FHEO believes that examining only the number of program compliance reviews FHEO conducts in a fiscal year does not fully reflect the effectiveness of its review efforts. 118/ On receiving a draft copy of this chapter, Assistant Secretary Monroig wrote:

> The Department's strategy in the last few years proceeds on the assumption that we will never have the resources to conduct compliance reviews for more than a small percentage of the 13,500 recipients of HUD funds in any fiscal year. Thus, the important element becomes the selection of those recipients for review which are most likely to have compliance problems. 119/

FHEO also stated that its careful selection of those recipients to be reviewed has worked effectively and that the percentage of compliance reviews with findings of noncompliance rose from 5 percent in FY 80 to 29 percent in the first half of

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117/ FHEO believes that two deskguides (operations manuals) now being prepared will improve FHEO program compliance reviews of public housing authorities and of HUD block grant activities. (Both deskguides were to have been produced in FY 82 but were delayed.) Pearl May 27 Interview; Monroig Letter and Enclosures, p. 7.

118/ Monroig Letter and Enclosures, p. 6.

119/ Ibid, p. 7.

FY 83. 120/ The increased findings by FHEO of noncompliance also may be the result, in part, of an actual increase in discriminatory conduct. 121/

If FHEO were able to achieve successfully its FY 84 objective of conducting 362 program compliance reviews, this level of activity, nonetheless, would examine only 2.7 percent of HUD's program recipients in FY 84. 122/ As a result, FHEO compliance reviews will continue to have limited effect in deterring and detecting unlawful discrimination in HUD-assisted activities because they reach so few recipients. FHEO continues to believe that improved targeting of reviews and staff training and guidance will permit it to achieve its numerical goals and improve program quality. 123/

120/ Ibid. Commission staff were not able to examine independently the improvement cited. By way of comparison, the Commission found in the mid-1970s that 21 percent of FHEO Title VI compliance reviews resulted in findings of noncompliance. 1979 Fair Housing Report, p. 39.

121/ Pearl May 27 Interview.

122/ Examining 2.7 percent of its program recipients a year (362 reviews), HUD would require more than 37 years to conduct 1 compliance review of each of its 13,500 program recipients. HUD's stated goal in the late 1970s was to conduct annual reviews of 4 percent of its program recipients. 1979 Fair Housing Report, p. 38. Even an annual 4 percent level of compliance review activity would mean that detailed auditing of the civil rights status of its program recipients would be infrequent.

123/ Monroig Letter and Enclosure, p. 7.

Reviews of Low-Income Public Housing

Low-income public housing is a program area in which inadequate HUD compliance review activities have had clearly negative consequences by leaving untouched deeply entrenched segregation in local public housing. 124/ FHEO itself has stated that HUD's public housing program "remains racially segregated" and in violation of both Title VI and Title VIII. 125/ HUD agreed in a 1979 Memorandum of Understanding with the Department of Justice to revise its policies to "promote desegregation" of its public housing projects 126/ but took no specific steps to carry out this agreement. 127/ HUD subsequently has taken no concerted action to correct segregation within public housing projects across the country. 128/

124/ "Management Control Assessment of the HUD Tenant Section and Assignment Policy," p. 14 (hereafter cited as Management Control Assessment), Attachment to HUD Implementation Plan for Civil Rights Programs. The Management Control Assessment notes that segregation in public housing assisted by HUD has been a longstanding problem. Ibid., p. 14.

125/ Ibid.

126/ Ibid., p. 8; HUD and DOJ Memorandum of Understanding, pp. 7-9.

127/ Management Control Assessment, p. 8. HUD had taken no further action as of May 26, 1983. Laurence D. Pearl, Director, Office of HUD Program Compliance, FHEO, HUD, telephone interview, May 26, 1983

128/ Pearl May 27 Interview.

FHEO itself has reported that it conducts few compliance reviews of public housing authorities and has acknowledged that its efforts to desegregate public housing have not been very successful. 129/ Compliance reviews by FHEO are so infrequent that they are an unlikely prospect in most years for most public housing authorities. 130/ As a result, there is little scrutiny by HUD and few resulting sanctions to induce local

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129/ Management Control Assessment, p. 13-14. HUD notes, for example, that based on its performance in FY 81, "the average public housing authority would receive a compliance review approximately once every 21 years." Ibid., p. 13.

130/ Ibid. FHEO stated that it has "markedly increased" compliance reviews of public housing in the Atlanta, Chicago, and Fort Worth Regions in FY 82 and FY 83, areas which "contain the largest numbers of [public housing authorities] with segregated or racially identifiable housing patterns. Increased numbers of findings of apparent noncompliance and compliance agreements have been the result." Monroig Letter amd Enclosures, p. 7. An internal HUD analysis concluded, however, that continuing public housing segregation and inaction by HUD to correct it have left HUD liable to a court order, similar to that in Adams v. Bell "where the Court took control of HEW's compliance review activities." The analysis concluded, "HUD could conceivably be ordered by a court to conduct compliance reviews beyond its capacity." Management Control Assessment, p. 9, citing Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92, 94-100 (D.D.C. 1973), modified and aff'd., 480 F.2d 1159 (D.C. Cir. 1973), supplemental order sub. nom. Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975), second supplemental order sub. nom. Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977), Adams v. Califano, No. 3095-70 (D.D.C. Dec. 29, 1977), Adams v. Bell, No. 3095-70, and Women's Equity Action League v. Bell, No. 74-1720, order (D.D.C. Mar. 11, 1983).

authorities to halt discriminatory practices and to remedy the effects of such unlawful conduct. 131/

Support for Voluntary Compliance

HUD officials have emphasized their increasing reliance on voluntary means of gaining compliance with Title VIII. 132/ One longstanding HUD approach to achieving voluntary fair housing compliance has been through the establishment of local Community Housing Resource Boards (CHRBs), composed of persons concerned with fair housing issues. 133/ These boards are

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131/ HUD has planned for FY 84 a "demonstration" project on public housing desegregation methods. As the total research budget for fair housing has been cut by more than 50 percent from its FY 82 level, lack of funds will limit the number or amount of individual grants that can be made under the project. HUD, FY 1984 Budget (Summary) (January 1983), pp. PDR-1, 2 (hereafter cited as FY 84 HUD Budget).

132/ Samuel R. Pierce, Jr., Secretary of Housing and Urban Development (remarks before the Ninth Annual Convention of the National Conference on Black Mayors, New Orleans, Louisiana, Apr. 20, 1983); and "HUD's Approach to Housing Bias Stresses Cooperation Over Litigation," Washington Post, Jan. 4, 1983, p. A-13. FHEO noted other aspects of its voluntary compliance effort. For example, a New Horizon Fair Housing Assistance Project encourages States and localities to utilize strategies "to affirmatively promote fair housing." FHEO also noted that its office of Voluntary Compliance organized and directed 6 regional symposia during FY 83, with a total of 2,000 participants, on the subject of public and private sector cooperation on housing problems. The same office conducted a conference in FY 82 for 400 participants on HUD's Community Housing Resource Boards. Monroig Letter and Enclosures, pp. 8-11.

133/ HUD, Community Housing Resource Boards (Handbook 8021.2) (June 1980), pp. 2-1 (hereafter cited as CHRB Handbook).

to work with local groups of real estate professionals that have signed Voluntary Affirmative Marketing Agreements with HUD, 134/ overseeing implementation of these agreements, recruitment of minority real estate personnel, and monitoring of local marketing procedures. 135/ The boards also carry out their own local education programs on fair housing matters. 136/ HUD believes that successes "have been achieved" in each of these areas. 137/

When the CHRB program began in the mid-1970s, HUD provided no direct financial assistance to it. 138/ Inadequate local funding, however, led HUD in FY 81 to seek a $2 million annual authorization for the program. 139/ Between FY 81 and the

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134/ Ibid. HUD notes that 1,200 such agreements have been signed. Monroig Letter and Enclosures, p. 8.

135/ Justification for 1984 Estimates, attachment III, pp. 5, 6.

136/ FY 84 HUD Budget, p. FHEO-4.

137/ Monroig Letter and Enclosures, p. 9. FHEO states that its national agreements with real estate organizations have led to "continuous dialogue" on fair housing issues, to increased use of the HUD fair housing symbol, to fair housing training, and to distribution of printed material regarding the fair housing obligations of the real estate industry. Ibid.

138/ Nathaniel K. Smith, Director, Housing and Community Development Division, Office of Voluntary Compliance, FHEO, HUD, telephone interview, June 7, 1983.

139/ HUD, Budget: Fiscal Year 1981 (Summary) (January 1980), p. FHEO-5-6.

beginning of FY 83, the number of boards grew from 375 to 613, according to HUD, although in each year only a limited number of these was funded. 140/ In FY 83, HUD said it would assist an estimated 170 boards, or about 28 percent of the total number. 141/ In FY 84, HUD will reduce its funding for the program by 50 percent to $1 million. 142/ The number of local boards assisted will drop to only 50 (about 8 percent of the total number of CHRBs in FY 83). 143/

HUD has acknowledged that its local volunteer boards may cease operations without funding assistance. 144/ This

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140/ See Justification for 1982 Estimates, p. R-6 and Justification for 1983 Estimates, P-6.

141/ Justification for 1984 Estimates, attachment III, pp. 1, 5.

142/ Ibid., attachment III, p. 5. HUD stated that the reduction in the FY 84 appropriation for CHRBs was due to earlier "delays" in obligating funds. HUD added, "These delays have now been rectified, and the obligations are matching the appropriations. We expect that the program will return to its full funding level in the future." Monroig Letter and Enclosures, p. 9.

143/ Justification for 1984 Estimates, attachment III, p. 5.

144/ Ibid.

problem was already apparent in late 1982 when HUD reported that only 67 percent of them were functioning. 145/

Coordination of Federal Fair Housing Activities

The Commission previously has concluded that HUD lacked sufficient resources to carry out effectively its responsibilities for coordination and leadership of Federal fair housing activities. 146/ In 1979 the Commission recommended that the President demonstrate his support of HUD's leadership role by emphasizing to all Federal agencies that under Title VIII 147/ HUD is vested with overall authority and responsibility for the administration of Federal fair housing efforts. 148/

145/ James C. Cummings, Jr., Director, Office of Voluntary Compliance, FHEO, HUD, memorandum to John Waller, management analyst, Management Systems and Services Division, FHEO, HUD Dec. 6, 1982. HUD described the remaining 33 percent of CHRBs as being "in need of reorganization." HUD counted a total of 585 CHRBs as "in existence" as of December 1982 but said only 400 of these were "functioning." Ibid. As of September 19, 1983, however, FHEO indicated that 600 CHRBs were "functioning." Monroig Letter and Enclosures, p. 9. HUD did not offer an explanation for the difference in the 2 numbers it reported.

146/ 1979 Fair Housing Report, p. 231.

147/ 42 U.S.C. §3608(a) (Supp. V 1981).

148/ 1979 Fair Housing Report, p. 233.

In 1980 the issuance of Executive Order 12,259 149/ underscored HUD's responsibilities for gaining the cooperation of all Federal agencies and coordinating their activities to advance national fair housing objectives. HUD was given the additional responsibility under the Executive order for issuing regulations defining the fair housing responsibilities of Federal agencies. 150/ During FY 83 FHEO took no action to carry out its Executive Order 12,259 responsibilities for leadership and coordination of Federal fair housing efforts. 151/

Similarly, FHEO did not act to develop implementing regulations for Executive Order 12,259. 152/ The FY 84 budget does not allocate staff hours or otherwise indicate that HUD will initiate activity in either area of its responsibilities under the Executive order during the coming fiscal year. 153/

149/ Exec. Order No. 12,259, 3 C.F.R. 307 (1981) reprinted in 42 U.S.C. §3608 app. at 816-18 (Supp. V 1981).

150/ Ibid.

151/ Peter Kaplan, Director, Office of Program Standards and Evaluation, FHEO, HUD, telephone interview, July 21, 1983.

152/ Kaplan June interview.

153/ According to the Assistant Secretary for Fair Housing and Equal Opportunity, "[T]he Department believes that the better time to develop such implementing regulations is after the amendments to Title VIII [now before the 98th Congress] have been adopted. To develop regulations to implement a law which will change in coverage, definitions, and sanctions would be a terrible waste of already scarce resources. The Department will move to carry out its leadership authority when the amendments have become law." Monroig Letter and Enclosures, p. 11.

DEPARTMENT OF LABOR

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Enforcement Responsibilities

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcing Executive Order 11246, 1/ which prohibits discrimination in employment by Federal contractors because of race, sex, religion, color, or national origin and requires them to take affirmative action in hiring, promotion, pay, and training to assure nondiscrimination for minorities and women. It is also responsible for ensuring equal employment opportunity for handicapped workers 2/ and Vietnam-era veterans. 3/ These authorities protect more than a quarter of the Nation's workers and cover over 115,000 contractor facilities. 4/ In addition, a new law, the Job Training Partnership Act of 1982, requires OFCCP to issue regulations for determining the degree to which a training program satisfies a contractor's affirmative action

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1/ Exec. Order No. 11,246 §202(6), 3 C.F.R. 339 (1964-65 Comp.) reprinted in 42 U.S.C. §2000e app. at 1232 (1976), 41 C.F.R. §60-1.2 (1982).

2/ Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793(a) (1976 & Supp. V 1981), requires Federal contractors to take affirmative action to hire and promote qualified handicapped workers.

3/ The Vietnam-Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §2012(a) (1976 & Supp. V 1981), prohibits discrimination against Vietnam-era veterans and disabled veterans of all wars.

4/ Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1983, p. 1 (hereafter cited as Collyer Letter and Enclosure).

obligations. 5/ As with many other Federal civil rights agencies, its enforcement activities include compliance reviews, complaint investigations, monitoring, and technical assistance.

OFCCP is another key Federal civil rights enforcement agency which has been under court orders governing its operations. 6/ Despite these court orders, which reflect

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5/ Pub. L. No. 97-300, §481, 96 Stat. 1390 (codified at 29 U.S.C.A. §1781(b)(2) (West Supp. 1976-1982)).

6/ OFCCP remains under five court orders, all of which predate the present administration. J. Stanley Kelly, Acting Director, Division of Program Analysis, OFCCP, telephone interview, Oct. 17, 1983. For example, in 1977 a Federal district court issued a consent order settling complicated litigation against the Departments of Labor and Health, Education, and Welfare, including a suit by the Women's Equity Action League (WEAL), for failing to enforce nondiscrimination on the basis of sex in institutions of higher education. Adams v. Califano, No. 3095-70 (D.D.C. Dec. 29, 1977) (consent decree), and WEAL v. Califano, No 74-1720 (D.D.C. Dec. 29, 1977) (consent order). That order committed OFCCP, among other things, to conduct each year a certain number of compliance reviews, including preaward reviews, and to maintain certain employment data. Finding that the 1977 order "has been violated in many important respects..., "the court in 1983 issued a new order, which the Labor Department has appealed. Adams v. Bell, No. 3095-70 (D.D.C. Mar. 11, 1983), appeal docketed, No. 83-1590 (D.C. Cir. June 3, 1980), and WEAL v. Bell, No. 74-1720 (D.D.C. Mar. 11, 1983) appeal docketed, No. 83-1516 (D.C. Cir. May 11, 1983) (the cases were consolidated on appeal Aug. 26, 1983) (hereafter cited as WEAL 1983 Order). The new order requires OFCCP, among other things, to complete an "appropriate" number of compliance reviews of higher education institutions and to complete complaint investigations within specific time frames. WEAL 1983 Order at 25. It also requires OFCCP to maintain employment data on these institutions and to report to plaintiffs, semi-annually, its compliance activities. Id. at 32-33. Under another consent order, OFCCP's New York City area office must conduct at least 10 compliance reviews of construction contractors each year, also within specific time frames. The New York area office conducted only seven reviews of construction contractors in the past 3 years. Fight Back v. Donovan, 97 D.L.R. (BNA) A-3 (S.D. N.Y. Apr. 29, 1983).

longstanding inadequate monitoring of Federal contractors, 7/ and despite its steadily increasing responsibilities, the agency's resources have been reduced significantly since FY 80. Those cuts have been accompanied by proposed policy changes, which, notwithstanding staffing inadequacies and court orders, involve relaxation of certain compliance requirements and expansion of efforts to induce voluntary compliance

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7/ See U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. V, To Eliminate Employment Discrimination (1975), pp. 631-37 (hereafter cited as To Eliminate Employment Discrimination); The Federal Civil Rights Enforcement Effort--1977, To Eliminate Employment Discrimination: A Sequel (1977), pp. 61-143 (hereafter cited as Sequel); Civil Rights: A National, Not a Special Interest (1981), p. 44 (hereafter cited as FY 82 Budget Statement).

with Executive order requirements. 8/

8/ In 1981 and 1982 OFCCP proposed substantial changes in its affirmative action requirements for Federal contractors. The proposals would, among other things, free a substantial number of contractors from the requirement to develop written affirmative action plans, require fewer contractors to file with OFCCP basic employment reports (EEO-1 and EEO-6 forms), and offer a selection of affirmative action plans that, once approved, would require minimal OFCCP scrutiny. See 46 Fed. Reg. 42968 (1981); 47 Fed. Reg. 17770 (1982). The Labor Department noted that proposals to reduce reporting requirements would make them consistent with Title VII requirements imposed by the Equal Employment Opportunity Commission. Collyer Letter and Enclosure, p. 4. The Commission has pointed out before, however, that strict conformity between the coverage of OFCCP and EEOC reporting requirements is not necessary. "For OFCCP to require a contractor to complete a form when EEOC requires no form does not create the same type of conflict as would be created if the two agencies were requiring different forms from the same contractor...the more central question should be whether the completed reports will be useful to OFCCP...." U.S. Commission on Civil Rights, "Comments on Proposed Revisions and Redesignations of Regulations Issued by the Department of Labor, Office of Federal Contract Compliance Programs, on September 17, 1976," Dec. 27, 1976, p. 9, n. 19 (hereafter cited as Dec. 1976 Comments). For an evaluation of the Department's proposals and the Commission's recommendation that they be withdrawn, see U.S. Commission on Civil Rights: "Staff Comments on Proposed Rule (Affirmative Action Requirements for Government Contractors) Issued by the Department of Labor, Office of Federal Contract Compliance Programs," Oct. 26, 1981 (hereafter cited as Oct. 1981 Comments); "Staff Comments on Affirmative Action Requirements for Government Contractors Proposed by the Department of Labor, Office of Federal Contract Compliance Programs," May 24, 1982 (hereafter cited as May 1982 Comments); The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982), pp. 40-50 (hereafter cited as FY 83 Budget Report); and John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to Clarence Thomas, Chairman, Equal Employment Opportunity Commission, Mar. 15, 1983.

Budget Totals

As table 7 shows, OFCCP's budget declined by $9.2 million between FY 80 and FY 83. The agency requested $47.4 million for FY 84, the first increase in 4 years, but that figure would not restore OFCCP funding to the FY 80 level or compensate for inflation. While there is no exact measure of OFCCP's losses in spending power due to inflation since FY 80, a general formula for considering the impact of inflation is provided by the Congressional Budget Office (CBO). Its Gross National Product deflators are not geared specifically to rising costs in the Federal sector but may offer a rough approximation of trends in enforcement resources, including OFCCP's. Under its proposed FY 84 budget, OFCCP would appear, based on the CBO measure, to have about 29 percent less actual spending power than it had in FY 80. 9/

Staffing and Other Resources

Office of Federal Contract Compliance Programs staff resources also dropped significantly between FY 80 and FY 83. While it had 1,482 authorized positions in FY 80 and FY 81, the agency could not fill them because of hiring freezes and other

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9/ This estimate is derived by dividing OFCCP's appropriations by a factor that accounts for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 20, 1983. For a fuller discussion of the use and limits of these formulas, see chapter 1.

Table 7

OFCCP Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980	$51,846
1981	50,086
1982	43,150
1983	42,614
1984 (Request)	47,393

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a/ Figures represent what OFCCP could have spent during a whole fiscal year under each spending ceiling.

SOURCES: Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1983, p. 5 (for FY 80 and FY 81 appropriations); and Ellen Shong, Director, OFCCP, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 25, 1983 (for FY 82 and FY 83 appropriations and FY 84 request).

employment restrictions imposed government-wide. 10/ As table 8 shows, in FY 83 it was authorized 1,008 positions, a sharp reduction from the FY 80 and FY 81 level. In early 1982, OFCCP reduced its staff by 19 percent. 11/ Two-thirds of the employees reduced in grade, transferred, or laid off at that time had carried out enforcement activities. 12/ For FY 83 and FY 84 the proposed staffing level is to remain at the FY 82 level. That figure would leave OFCCP with only 68 percent of its FY 80 authorized staffing strength.

10/ Collyer Letter and Enclosure, p. 4.

11/ Before that time, OFCCP had an actual employment level of 1,232. Ellen Shong, Director, OFCCP, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 25, 1983 (hereafter cited as Shong Letter and Enclosures).

12/ Of the 196 employees affected by the reduction in force, 132 were program staff. David A. Rutherford, program analyst, Planning Branch, Division of Analysis, OFCCP, memorandum to Joyce Long, civil rights analyst, U.S. Commission on Civil Rights, "OFCCP Data," May 11, 1983 (hereafter cited as OFCCP Data).

Table 8

OFCCP Full-Time, Permanent Staff Positions: FY 1980-84

Fiscal Year	Authorized a/	Actual b/
1980	1,482	1,304
1981	1,482	1,232
1982	1,008	988
1983	1,008	1,021 c/
1984 (Request)	1,008	---

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a/ Number of full-time, permanent staff permitted under congressional budget measures.

b/ Number of full-time, permanent staff actually employed by OFCCP. Except as noted, figures are for the end of the fiscal year.

c/ As of July 31, 1983.

SOURCE: Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1983, p. 6 (for FY 80 - FY 82 data and FY 83 actual staffing level); Charles E. Pugh, Deputy Director, OFCCP, telephone interview, Oct. 11, 1983 (for FY 83 and FY 84 authorized staffing levels).

In addition to major staff cutbacks, OFCCP has lacked other needed resources, especially a comprehensive and upgraded management information system. 13/ Without such a system, OFCCP is hampered in assessing data that contractors must report and the effects of its enforcement activities on employment opportunities for minorities and women, 14/ as well as in complying with certain court-ordered requirements. Indeed, OFCCP cited the lack of such a system as an obstacle to complying with the court's order in the WEAL litigation. 15/

OFCCP's proposed FY 84 budget includes funds for a new system to provide the agency with information to schedule and track compliance reviews, including construction reviews, which the current system does not track. 16/ This new system,

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13/ FY 83 Budget Report, pp. 44-45. See also To Eliminate Employment Discrimination, pp. 285-88, 665-66; and Sequel, p. 120. Most regional offices have to rely on manual input of compliance data, which may result in untimely reports filled with errors. OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," p. 1. Yet, according to OFCCP staff cited in the Commission's 1982 review of the proposed FY 83 enforcement budget, OFCCP did not implement a comprehensive information processing system funded by Congress in FY 81 because it anticipated a reduced need for such a system as a result of projected reductions in contractor reporting. FY 83 Budget Report, pp. 44-45. The Labor Department now maintains, however, that the previously planned system was not "cost-effective." Collyer Letter and Enclosure, p. 7.

14/ For inadequacies in the employment data OFCCP collects, see Oct. 1981 Comments, pp. 38-41, 51-52.

15/ Plaintiffs Women's Equity Action League, Et. Al.'s Motion for Order to Show Cause, Women's Equity Action League v. Bell, No. 74-1720 (D.D.C. June 24, 1981), Adams v. Bell, No. 3095-70 (D.D.C. June 24, 1981), at 14.

16/ Collyer Letter and Enclosure, p. 7.

however, would not provide OFCCP such basic data as the number of a contractor's job vacancies filled during the year by race, ethnic, and sex group in relation to that contractor's goals and timetables. 17/ Without this information, OFCCP cannot monitor contractors' performance in complying with key affirmative action requirements under the Executive order. 18/

Compliance Reviews

Compliance reviews have been OFCCP's most effective enforcement activity. 19/ OFCCP's compliance reviews cover 400 times as many workers as the average complaint

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17/ Charles E. Pugh, Deputy Director, OFCCP, telephone interview, Oct. 12, 1983.

18/ The Commission has cited this problem repeatedly. See To Eliminate Employment Discrimination, pp. 250-51, 285-87, 326-27, 665-66; Sequel, p. 120; and Oct. 1981 Comments, pp. 38-39 (pointing out the critical impact of this deficiency in the context of OFCCP's proposal for 5-year, rather than annual, affirmative action plans). Similar concerns were expressed by a Labor Department special task force and a Senate committee. See U.S., Department of Labor, Employment Standards Administration, OFCCP Task Force, "A Preliminary Report on the Revitalization of the Federal Contract Compliance Program" (1977), pp. 75-76 (hereafter cited as Preliminary Report); U.S., Congress, Senate Committee on Labor and Human Resources, Committee Analysis of Executive Order 11246 (The Affirmative Action Program), 97th Cong., 2d Sess. (1982), pp. 69-70.

19/ Craig A. Berrington, Associate Deputy Under Secretary for Employment Standards, Department of Labor, testimony, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1982, before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 97th Cong., 1st Sess., part 1 (1981), p. 709 (hereafter cited as Berrington Testimony).

investigation, which often involves only one person. Moreover, compliance reviews are twice as likely to result in corrective action as complaint investigations. 20/

Nonetheless, the agency has not had enough staff in recent years to do as many compliance reviews as were done before Executive order enforcement was consolidated in OFCCP. 21/ In FY 80 and FY 81, for example, inadequate staffing prevented OFCCP from meeting its program plans for compliance activities. 22/ The 20 percent reduction in OFCCP's

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20/ Ibid., p. 678.

21/ Until 1978, 11 different agencies were responsible for enforcement of Executive Order 11,246. In 1978 their responsibilities, and some staff, were transferred to OFCCP. That consolidation was intended to end duplicative and inconsistent enforcement. Exec. Order No. 12,086, 43 Fed. Reg. 46501 (1978). In FY 77, prior to consolidation, the Federal agencies responsible for reviewing contractors reportedly conducted a combined total of 16,000 reviews. These agencies had 1,600 staff assigned to contract compliance duties. OFCCP, FY 79 Budget Submission. The 16,000 figure is rough in that recordkeeping systems at various agencies prior to consolidation were of questionable quality. Collyer Letter and Enclosure, p. 8. In comparison with this estimate, which, while inexact, provides a general point of reference, OFCCP conducted 2,632 reviews in FY 80. OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," p. 35.

22/ Planned actions for FY 80 were reduced by nearly 25 percent during the first half of the fiscal year as a result of personnel problems, such as vacancies and inexperienced staff, at regional offices. OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," pp. 17, 22. In FY 81, program plans again were revised downward to reflect reduced staffing in the regions. OFCCP, "Fourth Quarter FY 81 Quarterly Review and Analysis Feedback Report," p. 1.

staffing level in early FY 82 temporarily affected staff productivity, 23/ although the agency managed to catch up with revised program plans by the end of the year. 24/ Ultimately, total compliance actions increased by the end of FY 82

23/ The agency had planned to complete 3,727 reviews and resolve 1,790 complaints in FY 82. OFCCP, "FY 1982 Program Plan" (hereafter cited as FY 82 Program Plan). In April 1982, the agency reduced its planned compliance reviews by 7 percent in order to increase planned complaint processing by 52 percent. Collyer Letter and Enclosure, p. 9. By the end of the second quarter of FY 82, OFCCP had completed only 32 percent of its revised planned compliance reviews and 40 percent of its revised planned complaint investigations for that period. OFCCP, "Second Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 4.

24/ By the end of FY 82, OFCCP accomplished 89 percent (3,452 planned; 3,081 completed) of the revised goal for compliance reviews and 95 percent (2,718 planned; 2,589 completed) of its revised goal for complaint resolutions. OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 7. In contrast, by the end of FY 81, OFCCP exceeded its goal for compliance reviews by 1 percent (3,081 planned; 3,135 completed) and for complaint investigations by 55 percent (1,158 planned; 2,136 completed). OFCCP, "Fourth Quarter FY 81 Quarterly Review and Analysis Feedback Report," p. 5.

compared to FY 81. 25/ As a result of new management controls and staff training aimed at improving productivity, 26/ and also expected regulatory changes and new operating standards and procedures, 27/ the agency reported increased activities in

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25/ OFCCP, "A-11-53 Submission (data on Federal civil rights activities) for FY 83 to the Office of Management and Budget" (hereafter cited as OFCCP A-11-53 Submission by fiscal year), p. 2. In FY 81, 9,225 actions were completed, as compared to 10,774 actions in FY 82. OFCCP, "Fourth Quarter FY 81 and FY 82 Quarterly Review and Analysis Feedback Reports," p. 5 and p. 7, respectively. These figures on compliance actions are problematic, however, because some activities were counted twice, inflating the figure for total actions. For example, some activities during a compliance review are included not only in the compliance review figure but also in other workload categories. OFCCP, Order No. 130gl, "Applicable Program Activity Structure (PAS) Codes for FY 82, and Time Coding Instructions," Apr. 16, 1982. After eliminating this double counting, the data show that, instead of completing 10,774 actions, OFCCP completed 9,663. OFCCP also double-counted in FY 81. Although it reported 9,225 completed actions, it completed only 8,193 actions that year. OFCCP, "Fourth Quarter FY 81 Quarterly Review and Analysis Feedback Report," p. 5. The Department explained that, for planning purposes, it does not specify time for these functions but counts them as distinct accomplishments. Collyer Letter and Enclosure, p. 9.

26/ One of the these new controls was the establishment of comprehensive and stringent performance standards. Shong Letter and Enclosures.

27/ As noted, the Commission has expressed concern that some of these changes will significantly limit effective enforcement and permit contractors excessive flexibility in complying with Executive order requirements. See p. 4.

FY 83 and projects further increases in FY 84. 28/

In addition to increasing the planned number of compliance reviews, OFCCP has reduced the average hours allowed for each review. 29/ Reduced time frames for completing compliance reviews may prevent staff from thoroughly investigating discrimination problems. 30/ According to a former senior

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28/ For FY 83, OFCCP had planned to conduct 4,424 reviews. OFCCP, "FY 83 Revised Program Plan." As its regulatory proposals had not yet been approved, however, the 4,224 figure was reduced to 4,026. Collyer Letter and Enclosure, p. 9. As of the third quarter, FY 83, the agency was ahead of that revised target by 317 reviews. Ibid. The Department projects 5,010 reviews in FY 84 if regulatory changes are made. Ibid., p. 10.

29/ In FY 81 staff were alloted an average of 200 hours to complete compliance reviews of a nonconstruction contractor. This was reduced to 190 hours in FY 82 and to 160 hours in FY 83. OFCCP, "FY 81, 82 and 83 Program Plans." Through the third quarter of FY 83, nonconstruction compliance reviews averaged 152 hours. Collyer Letter and Enclosure, p. 8.

30/ For the need for sufficient time to investigate pattern and practice or systemic discrimination, see Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, letter to Philip J. Davis, Director, Office of Federal Contract Compliance, Department of Labor, July 11, 1973, and Dec. 1976 comments.

OFCCP staff member, the new time constraints could make OFCCP a "paper shuffling" program and prevent the agency from properly identifying and resolving discrimination. 31/ They also may deter staff from insisting on appropriate negotiated conciliation agreements because negotiations may delay case closures and, thus, hinder staff in meeting their program plans.

Conciliation agreements are used to correct and remedy systemic discrimination 32/ and require a contractor to provide relief, including back pay where appropriate, for affected class members. 33/ The number of cases closed with

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31/ James Cisco, former Director, Program and Policy Division, OFCCP, Comments at Bureau of National Affairs Conference on "Equal Employment Opportunity and the Reagan Administration," Washington, D.C., June 2, 1983. The Labor Department maintains that it shares the Commission's concern over this possibility, but that "case quality and consistency" remain as important as timeliness and the total quantity of reviews. It believes that the quality of reviews depends basically upon the training and guidance provided OFCCP compliance staff and applies various quality control measures, such as case quality audits, to monitor the effectiveness of reviews. Collyer Letter and Enclosure, p. 10.

32/ Conciliation agreements also are used to correct major violations of the Executive order and regulations, such as "omitting a major ingredient from an affirmative action plan or insufficient good faith efforts." Collyer Letter and Enclosure, p. 11.

33/ 41 C.F.R. §60-2.1(b) (1982). An affected class is defined as "one or more employees, former employees, or applicants who have been denied employment opportunities or benefits because of discriminatory practices and/or policies by the contractor, its employees, or agents." OFCCP, Federal Contract Compliance Manual, p. 1-4.

these agreements has declined since FY 80. 34/ The number of potential affected class cases also has declined. 35/ Correspondingly, financial relief for victims of discrimination, including back pay, declined substantially between FY 80 and FY 82. 36/ New Labor Department data

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34/ In FY 81, 46 percent of the cases that identified violations were corrected with a conciliation agreement. In FY 82, 33 percent of the cases were closed with a conciliation agreement. As of the third quarter of FY 83, only 30 percent of the cases were closed with a conciliation agreement. Collyer Letter and Enclosure, p. 12. The remainder of the cases were closed with a letter of commitment, used to correct minor deficiencies.

35/ These cases must be remedied for a contractor to be considered in compliance. 41 C.F.R. §60-2.1(b) (1982). They are the most time consuming, but they yield more results in terms of resources, and they establish crucial legal precedents. Berrington Testimony, p. 707. In early 1982, OFCCP expected to place more emphasis on identifying and resolving affected class cases. Ibid. Yet, 47 percent fewer potential affected class cases were pending in FY 82 than in FY 80 and only 67 cases were closed, compared to 85 in FY 1980 and 113 in FY 81. In FY 82, 222 suspected affected class cases were pending compared to 467 cases pending in FY 80 and 361 pending in 1981. OFCCP, "Fourth Quarter Fiscal Years 1980, 1981, and 1982 Quarterly Review and Analysis Feedback Reports." This trend continued in FY 83. For the first quarter of FY 83, only 165 affected class cases were pending and 34 were closed as compared to 352 pending and 51 closed the first quarter of FY 82. OFCCP, "First Quarter Fiscal Years 1982 and 1983 Quarterly Review and Analysis Feedback Reports."

36/ In FY 80 financial settlements totaled $16.2 million, of which back pay amounted to $9.2 million for 4,334 employees. In FY 81 only $8 million in financial settlements was obtained, $5.1 million of it in back pay for 4,766 employees. These figures dropped still more in FY 82, to $7.3 million in financial settlements of which $2.1 million in back pay was obtained for 1,133 employees. OFCCP, "Fourth Quarter Fiscal Years 1980, 1981, and 1982 Quarterly Review and Analysis Feedback Reports."

indicate that this downward trend was reversed in FY 83. 37/

A Labor Department official suggests that OFCCP is finding fewer cases where conciliation agreements are necessary. 38/ Although 63 percent of the reviews conducted in the first three quarters of FY 83 resulted in findings of noncompliance, the deficiencies cited were primarily paperwork violations. 39/ Meanwhile, a Department representative testified in 1982 that job and wage disparities between minorities and nonminorities and women and men still exist among Federal contractors and are due to insufficient affirmative efforts to overcome the inequities, discrimination, and inadequate training to move minorities and women into better jobs. 40/

37/ Total financial settlements through the first three quarters of FY 83 were $10.5 million, of which back pay totaled $3 million. Collyer Letter and Enclosure, p. 12; Charles E. Pugh, Deputy Director, OFCCP, telephone interview, Oct. 12, 1983. Promotions and training are other elements of these financial settlements.

38/ Commission staff notes on testimony of Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, June 8, 1983 (hereafter cited as Collyer 1983 Testimony) (maintained in Commission files).

39/ Ibid.

40/ Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, testimony, Oversight Hearings on the Activities of the Office of Federal Contract Compliance Programs of the Department of Labor, before the Senate Committee on Labor and Human Resources, 97th Cong., 2nd Sess., part 3 (1982), p. 9.

Preaward Reviews

As part of their enforcement efforts, some Federal agencies conduct compliance reviews before awarding funds. OFCCP is required to do such reviews when contracts total $1 million or more. 41/ When Federal contracts are pending, these reviews can stimulate prompt compliance. 42/ OFCCP nonetheless has moved to eliminate preaward reviews. 43/

41/ 41 C.F.R. §60-1.20(d) (1983).

42/ Oct. 1981 Comments, p. 2, and FY 83 Budget Report, pp. 48-49. The Labor Department contends that the "previous leverage of preaward reviews is no longer effective as an inducement" to bring contractors into compliance because Federal courts have held that denial of contract awards constitutes debarment without due process and thus is unconstitutional. Collyer Letter and Enclosure, p. 13. Current regulations permit OFCCP to "pass over" (without a hearing) a contractor it has determined is not complying with Executive order requirements, unless a contractor is passed over twice. 41 C.F.R. §60-2.2(b) (1983). In the Commission's view, the constitutionality of the passover procedure is not at issue. The Federal courts and the Department itself have found such procedures inconsistent with the hearing requirements of section 208(b) of Executive Order 11,246. See Illinois Tool Works v. Marshall, 601 F. 2d 943 (7th Cir. 1979); Pan American World Airlines v. Marshall, 439 F. Supp 487 (S.D. N.Y. 1977), Sunstrand v. Marshall, 17 FEP 432 (N.D. Ill. 1978); Preliminary Report, pp. 135-149. Moreover, no legal problems render preaward reviews ineffective. Expedited and focused preaward hearing procedures, such as those proposed by OFCCP in 1979, adequately meet the Executive order's hearing requirements. 44 Fed. Reg. 77007 (1979)

43/ In 1981, OFCCP proposed to eliminate the requirement to conduct preaward reviews. 46 Fed. Reg. 42973 (1981). The agency expected to gain approximately 15-20 staff years by eliminating preaward reviews. OFCCP FY 83 A-11-53 Submission. OFCCP said preaward reviews deny it the discretion to use its scarce resources most effectively and subject companies that repeatedly receive large contracts to excessive reviews. 46 Fed. Reg. 42973 (1981). For an alternative to OFCCP's proposed total elimination of preaward reviews, see Oct. 1981 Comments, pp. 1-5.

In FY 82, OFCCP conducted only 130 preaward reviews of the 16,194 contractors bidding on Federal contracts that year. 44/ In FY 80, by contrast, it conducted 594 such reviews of the 14,177 requests for clearance. 45/ Despite the fact they are now required by court order 46/ as well as agency regulation, no preaward reviews were planned for FY 83 or FY 84. 47/

44/ OFCCP, FY 84 A-11-53 Submission, undated.

45/ OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," pp. 38-39. In FY 82 preaward reviews represented 0.05 percent of the 3,081 reviews conducted that year. OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 7.

46/ The WEAL order requires OFCCP to conduct preaward reviews of education institutions bidding on contracts of $1 million or more. WEAL 1983 Order at 25.

47/ OFCCP, FY 83 and FY 84 A-11-53 Submissions. These plans were predicated on proposed regulations that would have eliminated the requirement. Ibid. OFCCP staff explained that since those regulations are not yet in effect, OFCCP continues to conduct preaward reviews but, for program plan purposes, counts them as routine compliance reviews. Collyer Letter and Enclosure, p. 13. The agency does not know how many compliance reviews conducted in FY 83 were preaward reviews. Sometimes preaward clearance requests are approved without an onsite investigation if data available to OFCCP indicate no problems. For the first three quarters of FY 83, 271 such requests were cleared through this method. Charles E. Pugh, Deputy Director, OFCCP, telephone interview, Sept. 27, 1983.

Companies receiving Federal contracts totaling billions of dollars each year, 48/ therefore, will not be reviewed for compliance with nondiscrimination and affirmative action requirements prior to contract awards. There also appears little likelihood, given staff cutbacks and policy changes, that they will be reviewed very soon after they receive their contracts. 49/

Complaint Investigations

A complaint backlog accumulated at OFCCP in previous years because the agency devoted most of its resources to compliance reviews. 50/ By early FY 83, however, that backlog was largely eliminated, 51/ in part because resources were shifted to reduce it, 52/ but also because, for whatever reason,

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48/ In FY 82 private companies received more than $158 billion in Federal contracts. Contracts of $10,000 or more amounted to $147 billion. William Abner, Director, Federal Procurement Data Center, General Services Administration, telephone interview, Apr. 18, 1983.

49/ OFCCP has been able to review only 5 percent of the approximately 17,000 contractors and 115,000 establishments covered by the Executive order. OFCCP, FY 83 A-11-53 Submission.

50/ Berrington Testimony, p. 678. OFCCP estimated that, by the beginning of FY 82, it would have 5,000 complaints backlogged. Ibid., p. 710. For the connection between this backlog and OFCCP staffing cuts, see FY 82 Budget Statement, p. 44; FY 83 Budget Report, pp. 49-50.

51/ OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 4. Pending complaints were reduced by 52 percent in FY 82, from 3,953 to 2,058. Ibid. Through the first three quarters of FY 83, pending complaints declined by 45 percent, down from 2,058 to 1,126. Collyer Letter and Enclosure, p. 13.

52/ Pugh May Interview.

substantially fewer new complaints were filed. 53/

Although more complaint cases have been closed, fewer have resulted in findings of discrimination. Sixteen percent of the investigations conducted in FY 82 sustained allegations of discrimination, 54/ as compared to 26 percent in FY 80. 55/ In addition, in FY 82 a higher percentage of complaints was closed without a full investigation. 56/ It is not clear what factors explain these changes.

53/ OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 2. In FY 80, 4,902 complaints were filed. OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report." In FY 81, 5,036 complaints were filed, compared to only 2,626 filed in FY 82. OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 4.

54/ OFCCP Data.

55/ OFCCP, "Fourth Quarter FY 80 Quarterly Review and Analysis Feedback Report," p. 48.

56/ OFCCP, "Fourth Quarter FY 82 Quarterly Review and Analysis Feedback Report," p. 2. In FY 82, 35 percent of the 2,584 complaint cases closed were closed administratively. OFCCP Data. Administrative closures rose to 36 percent in the first quarter of FY 83. OFCCP, "First Quarter FY 83 Quarterly Review and Analysis Feedback Report," p. 4. OFCCP closes complaints "administratively" (without a full investigation) when it cannot determine if an alleged discriminatory company is a Federal contractor; when a complaint is untimely filed; when OFCCP lacks jurisdiction; in the case of an old complaint, when the complainant cannot be located; and when complainants refuse to permit OFCCP disclosure of their identity to contractors. Complaints also are closed administratively when a satisfactory settlement has been achieved and no further action by the agency is required. OFCCP has not been able to determine the precise nature of administrative closures in the past, but it reports that a special review of third quarter FY 83 information found that of 601 total complaint investigations/resolutions accomplished that quarter 66 (nearly 11 percent) were closed administratively because the violations were remedied satisfactorily after the agency's initial involvement but without a full onsite investigation. Collyer Letter and Enclosure, pp. 13-14. The other complaints were administratively closed for one or more of the reasons listed above.

Technical Assistance

OFCCP does not report technical assistance as a separate item in its budget. Such assistance is considered a fractional part of the work of its staff, accounting for only 1.4 percent of staff time in FY 82. That figure was to increase to 5.5 percent in FY 83, in line with the agency's greater emphasis on efforts to encourage voluntary compliance with contract compliance program requirements. 57/

One new agency initiative to promote voluntary compliance involves encouraging contractors and other interested parties to form liaison groups nationwide to improve communications between the agency and the public. 58/ OFCCP does not yet know

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57/ This increased assistance generally involves increased availability of staff to respond to contractor inquiries about compliance requirements. Charles Pugh, Deputy Director, OFCCP, telephone interview, Aug. 10, 1983. The agency anticipated increased inquiries in connection with expected implementation of new affirmative action regulations and other policy changes. David A. Rutherford, program analyst, Planning Branch, Division of Program Analysis, OFCCP, telephone interview, Aug. 19, 1983. Assistance is also being provided contractors to develop new self-monitoring and reporting systems concerning their employment profile and progress in hiring and upgrading of minorities and women. Shong Letter and Enclosures.

58/ To date about 173 groups, almost all of which represent various industries, have been formed, and OFCCP expects formation of 200 groups by the end of FY 84. Collyer Letter and Enclosure, p. 14, and Collyer 1983 Testimony. The activities of the groups vary. Twelve industry liaison groups developed monographs to orient OFCCP about their industries so that agency staff would be more familiar with them before conducting compliance reviews. Cari Dominguez, Special Assistant to OFCCP Director, Comments at Bureau of National Affairs Conference on "Equal Employment Opportunity and the Reagan Administration," Washington, D.C., June 2, 1983.

whether such efforts will result in expanded job opportunities for minorities and women, 59/ the basic objective of the contract compliance program. Initiatives to promote voluntary compliance have not proven an effective alternative in the past, or even a significant supplement, to proper use of the agency's standard enforcement tools. 60/

59/ Shong Letter and Enclosures.

60/ U.S., Commission on Civil Rights, The Federal Civil Rights Enforcement Effort (1971), pp. 52 (n. 218), 84, 234-36, 351; and Barry L. Goldstein, Assistant Counsel, NAACP Legal Defense and Education Fund, Inc., "The Importance of the Contract Compliance Program: A Historical Perspective," 1981.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Enforcement Responsibilities

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII of the Civil Rights Act of 1964, 1/ the Equal Pay Act (EPA) of 1963, 2/ the Age Discrimination in Employment Act (ADEA) of 1967, 3/ and Section 501 of the Rehabilitation Act of 1973. 4/ These statutes require most private and public employers, including the Federal Government, to provide equal employment opportunity. In addition to investigating discrimination complaints (or charges), attempting to resolve them through conciliation, and undertaking litigation if conciliation fails, EEOC coordinates all Federal equal employment policies and procedures. 5/ As another important activity, the agency funds and provides

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1/ 42 U.S.C. §§2000e-2000e-17 (1976 & Supp. V 1981). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

2/ 29 U.S.C. §206(d) (1976). The Equal Pay Act prohibits discrimination on the basis of sex in compensation.

3/ 29 U.S.C. §§621-634 (1976 & Supp. III 1979). The Age Discrimination Act prohibits discrimination against older persons (aged 40-70) in hiring, promotion, discharge, compensation, and other terms, conditions, and privileges of employment.

4/ 29 U.S.C. §791 (1976 & Supp. V 1981). Section 501 requires Federal agencies to undertake affirmative action in the hiring, placement, and advancement of handicapped employees.

5/ Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 42 U.S.C. app. at 672-75 (Supp. V 1981), Exec. Order No. 12,067, 3 C.F.R. 206 (1979) reprinted in 42 U.S.C. app. at 668-69 (Supp. V 1981) (hereafter cited as Reorganization Plan No. 1.)

technical assistance to designated State and local agencies to assist in processing Title VII and age discrimination in employment complaints. 6/

In recent years, EEOC's budget has increased. The increase has been small, however, and resource problems appear to have contributed to limited progress or scaling back of functions such as complaint backlog elimination, litigation, and systemic investigations. Despite clear leadership commitments 7/ and management reforms, it remains to be seen whether budget and staffing levels will permit EEOC to fully overcome those setbacks and achieve the new gains it projects under its proposed FY 84 budget without jeopardizing the quality of its work. 8/

6/ 42 U.S.C. §2000e-8(b) (1976).

7/ EEOC's Chairman has repeatedly pointed to continuing job bias in this Nation and the vital importance of strong Federal leadership in combatting it. See, for example, Clarence Thomas, Chairman, Equal Employment Opportunity Commission (hereafter EEOC) (speeches before National Urban League, New Orleans, La., Aug. 2, 1983, and State of Missouri Human Rights Conference, Columbia, Missouri, Mar. 20, 1983).

8/ In commenting on this chapter in draft, EEOC said it does not believe that major resource constraints pose a significant barrier to the achievement of any "current" EEOC goal. John Seal, Director, Office of Management, EEOC, letter to Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 13, 1983 (hereafter cited as Seal Letter).

Budget Totals

As table 9 shows, EEOC's budget has increased slightly in recent years. No formula has been developed to determine how these increases have been affected by inflation. Congressional Budget Office (CBO) Gross National Product deflators, which are used in budget analyses, do not measure rising costs in the Federal sector precisely. They may nevertheless provide an estimate of trends in enforcement resources. Using the CBO formula, EEOC would appear to have experienced a real loss of about $5 million in actual spending power between 1980 and 1983. 9/ A similar adjustment for inflation indicates that despite the requested FY 84 increase, the agency still would appear to be left with about 20 percent less actual spending power in FY 84 than it had in FY 80.

Staffing

Although EEOC's budget has increased, its staff has been reduced. As table 10 indicates, authorized positions and actual staffing decreased between FY 80 and FY 83. During this period EEOC lost a total of 592 authorized positions, almost 16 percent of its FY 80 authorized strength. The FY 84 budget request, which would provide for the same staff level as in FY 83, will not make up for earlier losses of authorized positions.

9/ This estimate is derived by dividing EEOC's appropriation by a factor that accounts for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 20, 1983. For a fuller discussion of the use and limits of this CBO measure see chapter 1.

Table 9

EEOC Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980	$124,562
1981	141,200
1982	144,739
1983	147,421 b/
1984 (Request)	155,300

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a/ Figures represent what EEOC could have spent during a whole fiscal year under each spending ceiling.

b/ This figure includes a $4.6 million pay raise supplemental appropriation which EEOC received for FY 83.

SOURCE: John Seal, Director, Office of Management, Equal Employment Opportunity Commission, letter to Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 13, 1983 (for FY 80, FY 81, FY 82, and FY 83 appropriations); EEOC, 1984 Budget Submitted to the Congress of the United States (1983), p. 3 (for FY 84 request).

Table 10

EEOC Full-Time, Permanent Staff Positions: FY 1980-84

Fiscal Year	Authorized a/	Actual b/
1980	3,777	3,433
1981	3,416	3,412
1982	3,326	3,149
1983	3,185	3,167 c/
1984 (Request)	3,185	--

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a/ Number of full-time, permanent staff permitted under Congressional budget measures.

b/ Number of full-time, permanent staff actually employed by EEOC. Except as noted, figures are for the last day of the fiscal year.

c/ As of the end of the first quarter of FY 83.

SOURCE: John Seal, Director, Office of Management, Equal Employment Opportunity Commission, letter to Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 13, 1983.

Complaints Processing

In the 1970s, EEOC's inability to resolve individual discrimination complaints in a timely manner resulted in a huge backlog of Title VII complaints. 10/ New procedures implemented in 1977 helped reduce that backlog by 65 percent by the end of FY 80 and were expected to eliminate the backlog completely by the end of FY 82. 11/ By that point, it was expected staff resources could be focused more on major patterns and practices of discrimination. 12/ FY 82 budget restrictions, however, forced EEOC to defer its target date of the end of FY 82 for elimination of the backlog to the end of FY 83. 13/

10/ In December 1977 EEOC had an inventory of 99,000 unresolved charges. EEOC, Sixteenth Annual Report, FY 81 (1982), p. 3 (hereafter cited as EEOC FY 81 Report). EEOC currently defines backlog charges generally as those received by EEOC on or before Jan. 29, 1979. At the end of FY 82, 7,000 charges of the old 1979 backlog still remained. EEOC, "Draft Annual Report 1982" (undated, unpaginated).

11/ J. Clay Smith, Jr., Acting Chairman, EEOC, written statement submitted in testimony before the Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Committee on Appropriations, Mar. 11, 1981, p. 2 (hereafter cited as Smith 1981 Statement).

12/ Eleanor Holmes Norton, Chair, EEOC, statement, Oversight Hearings on Federal Enforcement of Equal Employment Opportunity Laws, before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 2d Sess. (1978), pp. 3 and 8 (hereafter cited as Norton Statement).

13/ Smith 1981 Statement, p. 2. EEOC also said that processing times for charges would lengthen as a result of budget restrictions, and the agency would put off plans to "absorb the entire federal equal employment opportunity complaint process, including the initial investigation of complaints, as originally contemplated." Ibid., pp. 13-14.

Meanwhile, new individual charges began to accumulate. 14/ By FY 82, 42 percent of EEOC's active inventory was 300-day old charges, 15/ and the average processing time was 186 days. 16/ By EEOC standards, active charges involving no more than 180 days of agency work are considered healthy or "current." Those over 180 days old are considered "aging," and complaints over 300 days old are considered "cause for concern, and for action." 17/

In testimony before Congress in early 1982, EEOC drew a more complete picture of the actual and expected impact on the agency of its FY 82 and FY 83 budgets. As noted in tables 9 and 10, its FY 83 budget reflected, except for a supplemental appropriation to cover a pay raise, generally the same spending level as in FY 82 but a further reduction in authorized staff

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14/ The Acting EEOC Chairman advised Congress that a "frontlog" of charges received since Jan. 26, 1979 was developing as new charges were increasing while staff was being reduced between FY 80 and FY 83. J. Clay Smith, Jr., Acting Chairman, EEOC, written statement submitted in testimony before the Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Committee on Appropriations, Feb. 25, 1982, p. 7 (hereafter cited as Smith 1982 Statement). See also EEOC, 1983 Budget Submitted to the Congress of the United States (1982), p. 16 (hereafter cited as EEOC FY 83 Budget).

15/ EEOC, 1984 Budget Submitted to the Congress of the United States (Jan. 1983), p. 16 (hereafter cited as EEOC FY 84 Budget).

16/ Seal Letter.

17/ EEOC, "Staff Discussion Paper, Fifth Annual EEOC/FEP Agency Conference" (1982), p. 3 (hereafter cited as 1982 EEOC/FEP Paper).

positions. EEOC informed Congress that, despite staff productivity increases, additional loss of staff, coupled with continually increasing workloads, would result in an increase in the agency's complaint inventory. 18/

The agency estimated that approximately 5,800 more charges would carry over at the end of FY 82 than at the end of FY 81, and that figure would increase to 7,500 charges at the end of FY 83. 19/ The age discrimination inventory, specifically, was expected to increase from 5,500 charges in FY 82 to 6,600 charges in FY 83. 20/ In reviewing these expected problems, a congressional committee questioned as "overly optimistic" EEOC's projection that the old Title VII backlog would be completely eliminated in FY 83. 21/

The FY 83 budget also would result in declining litigation, according to EEOC. The number of lawsuits filed would be reduced further in FY 83, and the number of consent decrees and

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18/ Smith 1982 Testimony, p. 7. The Acting EEOC Chairman noted that the agency "simply cannot improve upon our productivity at rates which would be required to offset our diminishing resources...." Ibid., p. 6.

19/ Ibid., p. 7.

20/ Ibid., p. 8.

21/ EEOC, "EEOC Responses to Additional Questions," Mar. 3, 1982 (requested by Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Committee on Appropriations) (hereafter cited as EEOC Responses).

settlements also would decrease. 22/ EEOC would be unable to fund new cases and would find it "exceedingly difficult" to support cases already in litigation. 23/

Persisting complaint backlogs and expected increases in new complaints thus were main elements of the unpromising situation facing the new leadership at EEOC in 1982. 24/ The agency has taken further steps to address these problems. To control the complaint inventory, for example, EEOC staff are being trained as generalists, rather than remaining specialists, and previously separate processing units (as have existed for age and equal pay complaint processing, for example) are being merged on a pilot basis. 25/ EEOC believes such steps will

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22/ Smith 1982 Testimony, p. 8. The agency did not specify the decline in lawsuits to be filed but said the number of consent decrees and settlements would decrease from 237 in FY 82 to 200 in FY 83. Ibid.

23/ Ibid., p. 9.

24/ Clarence Thomas became EEOC Chairman in April 1982.

25/ EEOC FY 84 Budget, p. 15. There has been some criticism of the merger proposal. For example, a 1982 report of the Senate Special Committee on Aging concluded that EEOC had not gained "sufficient expertise in ADEA charge processing and investigation to warrant merger of all processing units." U.S., Congress, Senate, Special Committee on Aging, Equal Employment Opportunity Commission Enforcement of the ADEA: 1979 to 1982, 97th Cong., 2d Sess. (1982), p. 7.

permit better use of its resources. 26/

Nonetheless, the pre-1979 Title VII backlog had not yet been completely eliminated as FY 83 drew to a close, 27/ and the likelihood that the agency will be able to reduce its inventory of new complaints to a "healthy" level remains questionable. As of the end of the third quarter of FY 83, EEOC had received 48,547 charges 28/ of the 60,610 charges

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26/ One step to specifically reduce the percentage of 300-day old charges involved incorporation of processing goals in staff performance standards. EEOC hoped to reduce this inventory of charges to no more than 5 percent of its active inventory in FY 83 and to retain it at that level in FY 84. EEOC FY 84 Budget, pp. 16 and 19. For FY 84, staff expect to reduce the pending Title VII, ADEA, and EPA inventory by roughly 4,000 charges through, in part, a 5 percent increase in staff productivity. In addition, a reduction in the average processing time (to less than 180 days) for charge resolution is projected. Ibid., p. 19. In FY 82, the average processing time was 186 days, and as of mid-year FY 83, it was 159 days. Seal Letter. See also Clarence Thomas, Chairman, EEOC, written statement submitted in testimony before the Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Appropriations Committee, Mar. 1, 1983.

27/ EEOC staff reported that as of the end of the third quarter of FY 83, 1,133 such charges still remained and could not estimate when they will be resolved. Some will require EEOC Commissioner clearance because they involve issues, such as comparable worth, on which EEOC policy has not yet been determined. John Schmelzer, Legal Advisor to the Director, Office of Program Operations, EEOC, telephone interview, Aug. 12, 1983.

28/ Ronald Passero, Director, Budget and Finance Division, Office of Management, EEOC, telephone interview, Sept. 30, 1983.

it had expected in all of FY 83. 29/ EEOC staff said that although complaints were therefore increasing in FY 83 at the expected rate, a "significant" reduction in the number of 300-day old charges had taken place. 30/

While inroads in FY 83 in reducing the pre-1979 backlog and 300-day old complaints, thanks to improved efficiency, have been reported, it should be noted that increased efficiency does not necessarily mean more effective enforcement. A top level EEOC official expressed concern that rapid charge processing procedures instituted in 1977 have led to a sharp decline in thorough investigations and a corresponding decline in the number of reasonable cause (possible discrimination)

29/ EEOC FY 84 Budget, p. 21. In FY 83 EEOC also expected at least 1,000 new charges as a result of its additional responsibility under a new Department of Justice-EEOC complaint referral rule. Elizabeth Thornton, Director, Coordination and Guidance Services, EEOC, interview, Apr. 28, 1983 (hereafter cited as Thornton Interview.) EEOC staff report, however, that less than 100 new charges were received during the first three months after publication of the rule, much fewer than expected. Seal September Letter. The referral rule, found at 48 Fed. Reg. 3570 (1983) (to be codified at 28 C.F.R. pt. 42; 29 C.F.R. pt. 1691), governs processing of employment discrimination complaints filed with Federal fund granting agencies under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-2000d-6 (1976 & Supp. V 1981), Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1976 & Supp. V 1981), the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221-1265 (1976 & Supp. V 1981), and other Federal laws with provisions against discrimination on the basis of race, color, religion, sex, or national origin in programs and activities receiving Federal financial assistance. Under this rule, EEOC receives employment discrimination complaints that fall under Title VI as well as Title VII.

30/ John Seal, Director, Office of Management, EEOC, telephone interview, Sept. 29, 1983 (hereafter cited as Seal September Interview). As of this writing, requested data on this point had not been provided.

findings, which, in turn, has had a "deleterious" impact on the agency's litigation program. 31/

Another problem with regard to complaints, which EEOC acknowledges cannot be resolved without additional staff, concerns complaints filed by Federal Government employees. Since January 1979, EEOC has been responsible for holding hearings on Federal employee job discrimination complaints and processing appeals from agency decisions on such complaints. 32/ In FY 80 EEOC had eliminated a backlog of Federal sector complaints appeals. 33/ In 1981 the agency's Acting Chairman told Congress, however, that Federal sector complaints were increasing dramatically, and processing periods for hearings and appeals of these complaints could be expected to lengthen. 34/ EEOC staff recently predicted a 33 percent increase in Federal sector complaints in FY 84 over the FY 83 total, with yet another 20 percent increase in FY 85 over FY 84. 35/ Staff said the agency must have more staff to handle the appeals and hearings of Federal sector complaints

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31/ David Slate, General Counsel, EEOC (speech delivered at Bureau of National Affairs Conference on "EEO and the Reagan Administration," Wash., D.C., June 3, 1983).

32/ Reorganization Plan No. 1.

33/ Smith 1981 Testimony, p. 8.

34/ Ibid., p. 14.

35/ Seal September Interview.

to prevent a major new backlog in that area from developing. 36/

State and Local Program

EEOC also funds and provides technical assistance to designated State and local fair employment practices (FEP) agencies to support their processing of Title VII and age discrimination in employment complaints. 37/ In 1981, FEP agencies resolved 43 percent of the Title VII national complaint workload. 38/ Despite the administration's plans to increase opportunities for States to participate in anti-discrimination enforcement efforts, 39/ less assistance from the FEPs in complaint processing is projected for FY 83 and FY 84. 40/ EEOC has attributed this decrease to fewer FEP staff available under EEOC contracts as a result of increased FEP operating costs. 41/

36/ Ibid.

37/ 42 U.S.C. §2000e-8(b) (1976). Title VII requires EEOC to defer for 60 days action on complaints where there is a governing State or local employment discrimination law. Qualified FEP agencies may process the complaints or waive jurisdiction. 42 U.S.C. §2000e-5(c) (1976).

38/ 1982 EEOC/FEP Paper, p. 2.

39/ U.S., Executive Office of the President, Office of Management and Budget, Special Analysis J, Civil Rights Activities, February 1982, p. 13.

40/ In FY 82 FEPs increased their Title VII charge resolutions over FY 81 by 18 percent. However, EEOC projected a 2.9 percent decrease in FEP charge resolutions in FY 83 and a 3.7 percent decrease in FY 84. EEOC FY 84 Budget, pp. 33-34.

41/ Ibid., p. 33.

Between FY 78 and FY 82, EEOC funding to State and local FEP agencies tripled. 42/ Although EEOC proposed a reduction in funding from $18.2 million in FY 82 to $18 million in FY 83, 43/ the agency received $18.5 million under its FY 83 continuing resolution. 44/ Under the proposed FY 84 budget, however, EEOC again has requested the same reduced level of $18 million. 45/

Like EEOC, some FEP agencies are experiencing problems processing complaints in a timely manner due to their reduced funding, limited staff resources, concentration on backlog cases, and increased complaint receipts. 46/ These problems

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42/ State and local funding was as follows: FY 78 - $6 million (1983 EEOC/FEP Paper, p. 1); FY 79 - $15 million (EEOC, Fourteenth Annual Report (1979), p. 25; FY 80 - $15 million (EEOC, Fifteenth Annual Report (1980), p. 29; FY 81 - $17.7 million (EEOC FY 83 Budget, p. 33); and FY 82 - $18.2 million (EEOC FY 84 Budget, p. 31).

43/ EEOC Responses.

44/ Seal Letter.

45/ EEOC FY 84 Budget, p. 31. In the continuing deliberations on the FY 84 budget, the Subcommittee on Commerce, Justice, State and the Judiciary of the Senate Committee on Appropriations voted to restore $500,000 and add another $500,000 so that the State and local program would receive $19 million, if that change is finally adopted. Ernest F. Hollings, U.S. Senate, letter to Frederick B. Routh, Director, Community Relations Division, Office of Congressional and Public Affairs, U.S. Commission on Civil Rights, Aug. 5, 1983.

46/ EEOC FY 84 Budget, p. 32; 1982 EEOC/FEP Paper, p. 3. During FY 82, over one-third of the FEP agencies under contract with EEOC had accrued a "substantial" number of cases that were more than 300 days old. 1982 EEOC/FEP Paper, p. 3.

could force FEP agencies to waive jurisdiction over more EEOC complaint deferrals, further increasing, rather than decreasing, EEOC's own caseload, and further diverting its attention from broader enforcement efforts. 47/

Class and Systemic Activity

EEOC can address widespread discrimination by investigating individual complaints that allege employer discrimination against a whole class of protected persons or by initiating investigations of discriminatory patterns and practices. 48/ These "systemic" activities are important because they can eliminate broad-based employment discrimination and open up opportunities to excluded groups.

EEOC has described its systemic program as the most effective means to attack patterns and practices of employment discrimination. 49/ Yet, for a number of years, EEOC's emphasis on eliminating its Title VII backlog has resulted in

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47/ To help deal with these problems, EEOC earmarked FY 82 and FY 83 funds for special 2-year inventory reduction contracts to underwrite additional staff to reduce these excess inventories. EEOC, "EEOC (FEP Agency Sixth Annual Conference, Mar. 16-18, 1983, Atlanta, Ga. Discussion Paper" (1983), p. 2.

48/ 42 U.S.C. §2000e-5(a)-(b) (1976).

49/ Norton Statement, p. 17.

the systemic program's receiving relatively less attention. 50/

According to EEOC staff, FY 83 was a "transition" year for the agency's systemic program, 51/ and the authorized level for systemic staff fluctuated. 52/ As the Title VII backlog is reduced, however, EEOC expects systemic staffing to stabilize. 53/

EEOC recently undertook a review of systemic program activities, and began efforts to improve the program's focus. 54/ A targeting model was developed to assist EEOC in identifying the most significant and timely systemic cases for

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50/ U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982), pp. 55-56 (hereafter cited as FY 83 Budget Report); The Federal Civil Rights Enforcement Effort - 1977; To Eliminate Employment Discrimination: A Sequel (1977), p. 212 (hereafter cited as Sequel). In FY 82, as field offices concentrated on eliminating the pre-1979 Title VII backlog, some staff assigned to the systemic program were used to work on that backlog. James Finney, Director, Systemic Programs, Office of Program Operations, EEOC, interview, May 3, 1983 (hereafter cited as Finney May Interview).

51/ Seal September Interview.

52/ Headquarters staffing was reduced from 82 authorized positions in FY 82 to 69 positions in FY 83. Finney May Interview. The authorized staffing ceiling in FY 83 recently was increased to 71 positions. The actual staff level as of Sept. 22, 1983 was 64. James Finney, Director, Systemic Programs, EEOC, telephone interview, Sept. 22, 1983 (hereafter cited as Finney September Interview).

53/ Finney May Interview.

54/ Seal September Interview.

the agency to pursue, a program to monitor settlement and consent decrees was instituted, and 2 new charges from headquarters were developed. 55/ The agency meanwhile reported success in reducing a backlog of pre-1979 systemic charges. 56/ Similar activities are planned for FY 84, with disposition of the remaining pre-1979 systemic complaints remaining a priority. 57/

In mid-October 1983, EEOC announced settlement of a major systemic case brought against General Motors Corporation 10 years ago. 58/ The EEOC Chairman reportedly noted that with that case settled, EEOC would be "pressing ahead with more cases in the future. We intend to go the systemic route and push these cases." 59/ At the same time, the press reported that EEOC was seeking a 10 to 15 percent increase in funds for

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55/ Finney September Interview. The 2 new charges currently are pending Commission approval.

56/ As of Sept. 22, 1983, EEOC had resolved 60 of the 77 pre-1979 systemic complaints that existed at the beginning of FY 83. Edward Ware, Assistant to the Director, Systemic Programs, EEOC, telephone interview, Sept. 22, 1983.

57/ FY 84 activities are to include, among others, refinement of the new targeting model, several "important" settlement negotiations, and filing of at least 10 new lawsuits. Finney May Interview and Seal Letter.

58/ EEOC, News Release: EEOC, General Motors and Union Sign Record-Setting Equal Opportunity Accord, Oct. 18, 1983.

59/ Joann S. Lublin, "GM to Spend $42.5 Million to Hire, Train Women and Minorities, Settling Bias Case, "Wall Street Journal, Oct. 19, 1983, p. 8.

such systemic probes. 60/ EEOC staff would neither confirm nor deny that press claim. 61/

Litigation

Litigation sometimes is a necessary last resort for obtaining relief for victims of discrimination and for enforcing critical Federal equal employment laws. The anticipated increase in complaint receipts may point to a need for more litigation, 62/ As noted, EEOC had concluded that proposed cuts in the agency's FY 82 budget would impair its litigation program. 63/

EEOC staff litigation recommendations from field attorneys to the General Counsel increased between FY 80 and 81 but

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60/ Ibid.

61/ John Seal, Director, Office of Management, EEOC, telephone interview, Oct. 19, 1983.

62/ See EEOC FY 84 Budget, p. 21. The EEOC Chairman recently noted that an "alarming" number of charges filed with EEOC have merit. Thomas New Orleans speech.

63/ EEOC staff recommended 393 cases in FY 80, 469 in FY 81, and 401 in FY 82. Berry letter; EEOC FY 81 Report, p. 29; Seal September Letter. EEOC noted that, "Cases recommended by field staff to the General Counsel are reviewed by headquarters and are in turn recommended by the General Counsel to the Commission. The Commission ultimately decides whether to authorize or reject litigation. Virtually all cases authorized by the Commission are filed in court." Seal Letter.

declined in FY 82. 64/ New litigation dropped sharply in FY 82, then increased slightly in FY 83 though falling short of FY 81 levels. It is not clear whether the decline was the result of staffing and budget problems or administrative and policy considerations, or both. 65/ EEOC's Chairman has cautioned that "...strict reliance on litigation in civil rights enforcement is neither good policy nor permitted by statute," 66/ but the agency nonetheless expects to authorizemore cases for litigation in FY 83 and FY 84 than it authorized in FY 82. 67/ It also projects benefits, such as back pay, from EEOC-initiated cases to increase from

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64/ In FY 80, the Commission authorized 322 cases; in FY 81, it authorized 364, in FY 82, it authorized 112, and as of July 31, 1983, it had authorized 146. As for case filings, in FY 80, EEOC filed 358 cases; in FY 81, it filed 444; and, in FY 82, it filed 241. As of the end of the third quarter of FY 83, it had filed 116. According to EEOC, "Case filings include both direct suits and interventions, which must be authorized by the Commission, and subpoena enforcement and preliminary relief proceedings, which do not require Commission authorization." Seal Letter.

65/ EEOC cited an agency reorganization, a comprehensive review of cases by the General Counsel to improve the quality of cases recommended, and closer Commissioner scrutiny of cases recommended by staff as reasons for the decline. Phyllis Berry, Acting Director, Office of Congressional Affairs, EEOC, letter to James B. Corey, Chief, Education and Employment Division, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 25, 1983 (hereafter cited as Berry Letter).

66/ Clarence Thomas, Chairman, EEOC (speech delivered before Third Annual Litigation Programs Conference, San Francisco, Calif., Jan. 13, 1983).

67/ EEOC projected 200 case authorizations in FY 83 and 300 in FY 84. EEOC FY 84 Budget, pp. 16 and 19. As of July 31, 1983, the Commission had authorized 146 cases. Seal Letter.

$20 million in FY 80 to $50 million during FY 84. 68/ Benefits as of the end of the third quarter of FY 83 totaled $21.2 million. 69/ EEOC staff meanwhile concede that staffing may be inadequate to handle the current caseload or to increase litigation. 70/

Technical Assistance

EEOC plans two initiatives in FY 83 and 84, an "expanded presence" effort in areas not adequately served by any of EEOC's field offices, and other educational and technical assistance to encourage voluntary compliance with national

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68/ Clarence Thomas, Chairman, EEOC, written statement submitted in testimony before the Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the Senate Appropriations Committee, Mar. 24, 1983, p. 3 (hereafter cited as Thomas 1983 Testimony). Benefits dropped to $16.2 million in FY 81 but then increased to $33.5 million in FY 82. Berry Letter.

69/ Seal Letter.

70/ Michael Middleton, Director, Trial Services, Office of the General Counsel, EEOC, interview, Apr. 26, 1983. EEOC lost about 50 staff attorneys in FY 82 due to attrition. A hiring freeze in June 1982 prevented filling the vacant positions, which subsequently were lost. Ibid. As of the end of the first quarter of FY 83, EEOC had 616 cases pending in litigation. Berry Letter.

employment discrimination laws. 71/ EEOC believes that these initiatives will increase public awareness of equal employment rights and help prevent employers from adopting potentially discriminatory policies and procedures. 72/

Current staff will be relied on to handle these projects. 73/ If staff are to be switched from the other activities, such as litigation or complaints, where they already are hard-pressed, these initiatives, however worthy they appear, could aggravate existing problems, especially if they stimulate additional complaints.

Coordination

In the past, lack of coordination among Federal agencies with equal employment opportunity responsibilities was a serious impediment to the Federal Government's efforts to attack employment discrimination effectively. 74/ The need for

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71/ Thomas 1983 Testimony, p. 3. Small teams of staff will travel to targeted areas (those not in proximity to EEOC field offices or State or local FEP offices) to explain employee rights under Federal employment discrimination laws. A technical assistance program also will focus on educating employers, including those with relatively few employees, about their compliance responsibilities. EEOC, News Release: EEOC Approves Field Reorganization Plan, Jan. 28, 1983 (hereafter cited as EEOC News Release).

72/ EEOC News Release.

73/ Ibid.

74/ U.S. Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, Vol. V, To Eliminate Employment Discrimination (1975), p. 576; Sequel, p. 332.

progress in resolving these problems was recognized in 1978 when Executive Order 12,067 assigned EEOC responsibility for providing leadership and coordination to all Federal agencies with equal employment opportunity responsibilities. 75/

Despite the importance of this new task, authorized staff positions for the coordination function have been declining steadily since FY 79. Between 1979 and April 1983, authorized positions were reduced from 25 to 16. 76/

As part of its responsibilities, EEOC must respond to agency requests for coordination of proposed issuances pertaining to Federal EEO enforcement programs. 77/ Despite a reduction in authorized positions, the number of agency reviews increased significantly in FY 83 compared to FY 82. 78/ On the other hand, EEOC has been slow to develop initiatives to improve interagency cooperation. In FY 82 it appears to have

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75/ Specific responsibilities include review of agency regulations pertaining to employment, reports and directives that could affect other agencies, and initiation of guidelines, standards, and other procedures to reduce duplication, inconsistency, and inefficiency in Federal equal employment programs. Exec. Order No. 12,067.

76/ FY 83 Budget Report, pp. 62-3; Thornton Interview.

77/ See Exec. Order No. 12,067.

78/ EEOC FY 84 Budget, p. 17. The number of reviews doubled from 8 in FY 82 to 16 in FY 83. Ibid.

done little more than prepare preliminary feasibility studies on developing standardized complaint procedures for all Federal agencies and improved information sharing. 79/

EEOC has identified several coordination activities to be undertaken in FY 84, 80/ but followup to past activity and new initiatives still appears limited. Problems of duplication and

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79/ FY 83 Budget Report, p. 62. None of these studies has resulted in published reports or followup action by EEOC. EEOC reported that its most significant interagency coordination activities in FY 83 to date include lengthy coordination of proposed affirmative action regulations for the contract compliance program and the DoJ-EEOC referral rule. Thornton interview. The agency also had to address the question of apparent implementation by OFCCP of certain policy changes through internal directives, without first consulting with EEOC as required by Executive Order 12,067. Both EEOC and this Commission have raised this issue. Clarence Thomas, Chairman, EEOC, Statement before Subcommittee on Employment Opportunities of the House Committee on Education and Labor, Apr. 15, 1983; Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Robert B. Collyer, Deputy Under Secretary for Employment Standards, Department of Labor, July 12, 1983. The Labor Department said reports of such changes were "not correct." Robert B. Collyer, Deputy Under Secretary for Employment Standards, U.S. Department of Labor, letter to Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, Aug. 25, 1983.

80/ For example, EEOC tentatively plans to provide unspecified guidance on Section 504 of the Rehabilitation Act of 1973 and "continued work" on development of an instructional manual to Federal agencies for preparing the detailed civil rights information that must be submitted with their budget requests to OMB. Seal Letter. EEOC had convened a workshop in 1981 to instruct Federal agency staff concerning civil rights data that should be reported in that form. Initiatives in "several other areas" also are under consideration. Ibid.

inconsistency, other than those revealed during interagency coordination of regulations, in Federal equal employment enforcement therefore may continue to receive only limited attention. 81/

81/ FY 83 Budget Report, p. 63. Other demanding problems, such as delays in the Federal sector EEO complaint processing system, also continue to face EEOC. As noted, the agency was compelled in FY 81 to defer plans to consolidate that program within EEOC. It still is considering various options for changing the system. U.S., General Accounting Office, Problems Persist in the EEO Complaint Processing System for Federal Employees (Apr. 7, 1983), pp.15-20. GAO noted that no date had been projected for issuance of proposed fundamental changes. Ibid., p. 20. EEOC staff said no major changes, such as centralizing complaint intake and investigation in EEOC, which would require considerably more staff for the agency, are contemplated in FY 84. Seal September Interview.

DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION

Enforcement Responsibilities

The Justice Department's Civil Rights Division has a unique role in Federal civil rights enforcement because it has responsibilities extending to all protections guaranteed by the Constitution, Federal laws, and Executive orders. 1/ It has primary responsibility for enforcing constitutional rights and some statutes, including the recently strengthened Voting Rights Act of 1965, 2/ the Civil Rights of Institutionalized Persons Act of 1980, 3/ and provisions in the United States Code that establish criminal liabilities for certain civil

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1/ U.S., Department of Justice, Civil Rights Division, "Salaries and Expenses, General Legal Activities," undated (prepared for FY 84 appropriations hearings), p. 167 (hereafter cited as CRD FY 84 Budget).

2/ 42 U.S.C. §§1971, 1973 to 1983bb-1 (1976 & West Supp. 1983). The Voting Rights Act prohibits denying full participation in the electoral process to minorities, persons who cannot read or speak English, and handicapped persons. It also establishes special provisions to guarantee voting rights in jurisdictions where denials were historically severe.

3/ 42 U.S.C. §§1997-1997j (West Supp. 1983). The Civil Rights of Institutionalized Persons Act grants the Attorney General authority to bring suit to enforce the civil rights of persons in prisons, jails, and mental health and mental retardation facilities.

rights violations. 4/ The Division has other significant litigation responsibilities. When negotiations fail, its suits are the only method of enforcing the fair housing requirements of Title VIII of the Civil Rights Act of 1968 5/ and nondiscrimination in public sector employment as required by Title VII of the Civil Rights Act of 1964. 6/ The Division also may handle other types of cases agencies refer when they believe litigation would be the preferable enforcement

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4/ There are more than 30 such provisions. U.S., Executive Office of the President, Office of Management and Budget, *Special Analyses of the Budget of the United States Government, Fiscal Year 1984*, undated, p. J-4 (hereafter cited as *Special Analysis J*). These include protections against police misconduct, other mistreatment by law enforcement officials, and hate group activity. The rights of workers, including migrant laborers, to seek and enjoy employment also is protected. See, e.g., 18 U.S.C. §241 (conspiracy against the rights of citizens), §242 (deprivation of rights under color of law), §245 (interference with federally-protected rights), §1581 (peonage), §1584 (involuntary servitude) (1976).

5/ 42 U.S.C. §§3601-3619 (1976 & Supp. V. 1981). Title VIII prohibits discrimination based on race, color, national origin, religion, or sex in the sale, purchase, financing, or rental of most dwellings. The Department of Housing and Urban Development is responsible for investigating and attempting to negotiate agreements to correct violations but has no actual enforcement authority. When negotiations fail in cases involving patterns and practices of discrimination or issues of general public importance, the Justice Department may bring suit. See 42 U.S.C. §3611(g) (1976).

6/ 42 U.S.C. §§2000e-2000e-17 (1976 & Supp. V 1981). Title VII prohibits denials of equal employment opportunity on the basis of race, color, national origin, sex, or religion. The Equal Employment Opportunity Commission has primary responsibility for enforcing the act, but only the Justice Department can bring suits to enforce compliance by State and local governments. See 42 U.S.C. §2000e-5&6 (1976 & Supp. V 1981).

method. 7/ In addition, it is responsible for coordinating enforcement of all prohibitions against race, sex, and handicap discrimination in federally-assisted programs. 8/

With such vast responsibilities, the Division's policies and the resources committed to them profoundly affect the Federal government's role in eliminating illegal discrimination. Because the Division has such influence in determining Federal enforcement through litigation and broad coordinating authority as well, its decisions shape all Federal agencies' civil rights enforcement efforts. The actions it takes and does not take are a primary expression of administration civil rights commitments. For this reason, particular regard must be paid to the Division's use of resources to support or modify Federal nondiscrimination requirements.

Noting the Division's resources had not kept pace with increases in its responsibilities, the Commission last year

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7/ Agencies may enforce major laws prohibiting discrimination in federally-assisted programs by terminating funds or by "any other means authorized by law." See, e.g., 42 U.S.C. §2000d-1 (1976) (enforcement provision of Title VI of the Civil Rights Act of 1964). This provision permits Federal assistance agencies to refer cases for litigation by the Justice Department. See, e.g., Brown v. Califano, 627 F.2d 1221, 1231-32 (D.C. Cir. 1980). The prohibition against employment discrimination by Federal contractors in Executive Order No. 11,246 also may be enforced by case referral to the Justice Department. 41 C.F.R. §60-1.26(a)(2)(1982).

8/ Exec. Order No. 12,250, 3 C.F.R. 298 (1981) reprinted in 42 U.S.C. §2000d-1 (Supp. V 1981) (hereafter cited as Exec. Order No. 12,250).

cited some key problems that could not be addressed adequately without additional staff. 9/ The Division did not gain staff, 10/ and problems apparently have persisted. 11/

Resource constraints, however, have not been the only factor limiting recent Division actions against discrimination. Division policies favor narrower Federal civil rights protections and remedies than those formerly pursued, and resources have been used in efforts to establish these policies through litigation and regulation. The Division bases its policies on its reading of legislative history and case

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9/ These included limited activities against changes in electoral rules that limit minority political participation, police misconduct, civil rights violations against Hispanics in the Southwest and Far West, victimization of migrant workers subject to involuntary servitude, equal protection violations against incarcerated juveniles and elderly nursing home residents, and racial violence. The Commission also noted major limits in coordination activities. U.S., Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982), pp. 35-39 (hereafter cited as FY 83 Budget Report).

10/ U.S., Department of Justice, Civil Rights Division, "Salaries and Expenses, General Legal Activities," undated (submitted for FY 82 appropriations hearings), p. 179 and "Salaries and Expenses, General Legal Activities," undated (submitted for FY 83 appropriations hearings), p. 133; William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983.

11/ For example, although the Division reports substantial activity against criminal civil rights violations, including a sharp increase in cases filed against individuals holding others in involuntary servitude or peonage, it apparently has been unable to carry out plans for special task forces to combat violations of Hispanics' and migrant workers' civil rights. Special Analysis J, pp. J-5-J-6; CRD FY 84 Budget, p. 172.

law. 12/ These legal interpretations, however, often are unnecessarily restrictive. 13/ The Division thus has chosen to construe Federal civil rights authority narrowly so long as no decisive ruling prevents it rather than seeking decisive broad rulings. 14/ This reverses the general thrust of over 20 years of Federal civil rights policymaking.

The administration's FY 84 budget proposed an increase for the Division but not enough to restore earlier staff losses. It is doubtful this increase would correct all problems related to staff shortages, especially where changing law or circumstances now require a greater role for the

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12/ For an overview of the Division's interpretation of legislative and judicial history, see William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division (speech delivered at the Annual Conference of Chairpersons of State Advisory Committees to the U.S. Commission on Civil Rights, Washington, D.C., Sept. 12, 1983) (hereafter cited as Reynolds SAC Speech).

13/ The Division's position on every issue and its merits are beyond the scope of this review. The Commission and the Justice Department, however, repeatedly have exchanged views on the precedents for broad and narrow interpretations of Federal civil rights laws. Documents cited in the discussion below present these in full detail and are available in Commission files.

14/ For examples of the Division's practice of following narrow interpretations unless the Supreme Court specifically rules otherwise, see William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Oct. 11, 1983, pp. 8-9 (hereafter cited as Reynolds October Letter).

Division. 15/ Even a larger increase, however, would not support fully effective enforcement so long as the Division channels resources into limiting Federal civil rights guarantees.

Budget Totals

Civil Rights Division responsibilities have increased substantially since 1980. Its budget also has increased, as table 11 shows. There is no standard formula for determining whether the increases have compensated for inflation. Congressional Budget Office Gross National Product deflators are used to measure inflation in budget analyses but are not geared specifically to rising costs in the Federal sector. 16/

15/ Factors calling for increased staff involvement include the Division's expanded responsibilities under the 1982 Voting Rights Amendments, 42 U.S.C.A. §§1973, b, aa-1a, and aa-6 (West Supp. 1983) (hereafter cited as 1982 Voting Rights Amendments), and, according to Division estimates, increased hate group activity. CRD FY 84 Budget, p. 171. The block grants established in 1981 also have increased the Division's responsibilities because it has to coordinate enforcement of major civil rights laws and specific requirements covering these as well as other Federal assistance programs. Exec. Order No. 12,250, §1-201. For specific civil rights provisions in recent block grants, see Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §§300w-7 (preventive health and health services block grant), 300y-9 (primary health care block grant), 708 (maternal and child health services block grant), 8625 (low income home energy assistance block grant), 9906 (community services block grant) (Supp. V 1981). Demands on staff resources would be further increased if Congress adopts proposals to permit referral of individual housing discrimination complaints for Justice Department litigation. See S. 1220, H.R. 3482, 98th Cong., 1st Sess. §810(c) (1983) (parallel bills); S. 1612, 98th Cong., 1st Sess. §6(g), H.R. 3747, 98th Cong., 1st Sess. §810(d)(1) (1983) (parallel bills).

16/ For a fuller discussion of the use and limits of these measures, see chapter 1.

Table 11

CRD Budget Totals: FY 1980-84

(in thousands of dollars)

Fiscal Year	Appropriation a/ (annualized)
1980	$15,145
1981	16,515
1982	17,499
1983	19,233 b/
1984 (Request)	21,290

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a/ Figures represent what the Division could have spent during a whole fiscal year under each spending ceiling.

b/ Adjusted to reflect $180,000 transferred from the Civil Rights Division to the Civil Division and a $650,000 supplemental appropriation granted in late FY 83.

SOURCES: U.S., Department of Justice, Civil Rights Division, "Salaries and Expenses, General Legal Activities," undated (submitted for FY 82 appropriations hearings) (for FY 80 and FY 81 appropriations); William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983 (for FY 82 and FY 83 appropriations and FY 84 request); Frank Atkinson, legislative counsel, Civil Rights Division, Department of Justice, telephone interview, Aug. 4, 1983 (for FY 83 transfer); James Sullivan, legislative counsel, Civil Rights Division, Department of Justice, telephone interview, Oct. 23, 1983 (for FY 83 supplemental appropriation).

They, nevertheless, may provide an approximation of trends in civil rights enforcement resources. With adjustments for inflation using the Congressional Budget Office formula, the Division would appear to have gained only very recently and then but slightly in actual spending power. 17/

For FY 84, an increase of approximately $2.06 million over the Division's FY 83 appropriation level has been proposed. 18/ Due mainly to rising operating costs, however, less than one quarter of the increase ($558,000) would be available for additional staff. 19/

Staffing

Even before 1980, the Civil Rights Division, in the Commission's view, needed additional staff to meet increasing

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17/ The Division's FY 83 appropriations, including the year-end supplemental, represented about 3 percent more spending power than it had in FY 80. Its FY 81 and FY 82 appropriations represented less than its FY 80 spending power. These estimates are derived by dividing the Division's appropriations by factors that account for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 30, 1983.

18/ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983; James Sullivan, legislative counsel, Civil Rights Division, telephone interview, Oct. 23, 1983. The funding level used for this estimate includes the $650,000 supplemental appropriation the Division received in late FY 83.

19/ CRD FY 84 Budget, p. 167. The increase also would provide an additional $327,000 for information systems and processing. Ibid., p. 189. The rest would go for built-in increases such as rent, telephone charges, and salaries for current staff. Ibid., p. 165.

responsibilities and improve enforcement in cases involving discriminatory patterns and practices, particularly violations of Title VIII fair housing requirements. 20/ The Division estimated it would need 18 more positions to meet these and its increased coordination responsibilities. 21/ As table 12 shows, it received none and, in fact, since has lost more than 50 positions (12 percent of its 1980 authorized staffing strength). The effects of this loss may have been limited to some extent by Division efforts to use its legal staff more effectively. 22/

The proposed FY 84 budget would authorize 399 positions for

20/ Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Mar. 7, 1980; Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to Birch Bayh, Chairman, Subcommittee on the Constitution of the Senate Committee on the Judiciary, June 10, 1980. Also, Division responsibilities had been increased by broader equal credit requirements and prohibitions against handicap and age discrimination, more pending cases of public employment discrimination, and budget amendments that, in effect, made suits by the Division the only Federal tool for enforcing school desegregation in cases involving pupil transportation. Ibid. These remain Division responsibilities.

21/ U.S., Department of Justice, Civil Rights Division, "Authorization Request, Fiscal Year 1981" (January 1980), p. 9. For Commission staff views that the Division would need significantly more staff to carry out its new coordination responsibilities, see Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to William M. Nichols, General Counsel, Office of Management and Budget, Sept. 12, 1980 (hereafter cited as Exec. Order No. 12,250 Comments).

22/ The Division reports that expanded use of an automated data system has enabled attorneys to handle more cases than formerly and that increased reliance on paralegal, part-time, detailed and other temporary personnel has freed them to concentrate more on legal issues. Reynolds October Letter, p. 1.

Table 12

CRD Full-Time Permanent Staff Positions: FY 1980-84

Fiscal Year	Authorized a/	Actual b/
1980	436	432
1981	436	437
1982	385	387
1983	384 c/	379 d/
1984 (Request)	399	---

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a/ Number of full-time, permanent staff permitted under Congressional budget measures.

b/ Number of full-time, permanent staff actually employed by the Division. Except as noted, figures are for staffing near the beginning of the fiscal year.

c/ One additional position, transferred for administrative purposes to another unit, still serves the Division.

d/ As of August 10, 1983.

SOURCES: U.S., Department of Justice, Civil Rights Division, "Salaries and Expenses, General Legal Activities," undated (submitted for FY 82 appropriations hearings), p. 179 (for FY 80 authorized and actual staff) and "Salaries and Expenses, General Legal Activities," undated (submitted for FY 83 appropriations hearings), p. 133 (for FY 81 authorized and actual staff); William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letters to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 18, 1983, and Kathryn Baer, civil rights analyst, U.S. Commission on Civil Rights, Sept. 8, 1983 (for FY 82 and FY 83 authorized and actual staff and FY 84 request); Frank Atkinson, staff, Civil Rights Division, Department of Justice, telephone interview, Aug. 4, 1983 (for FY 83 staff transfer).

the Division. This would represent an increase of 15 positions over recent staffing levels, but still leave the Division 8.5 percent below its insufficient FY 80 strength. Staff for Voting Rights Act enforcement would be increased substantially. Many other activities limited by resource shortages in the past, however, would remain at current staffing levels. 23/

Voting Rights Act Implementation

Under the Voting Rights Act, the Civil Rights Division is responsible for preventing government officials and private citizens from using voting practices that exclude minorities from full participation in the political process. 24/ The act requires the Division to review proposed changes in certain jurisdictions' voting laws, practices, and procedures and

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23/ The only other activities that would receive additional staff are those carried out by the section that enforces protections against criminal civil rights violations. This section would receive 3 new positions. CRD FY 84 Budget, p. 170.

24/ 42 U.S.C. §§1971, 1973 to 1973bb-1 (1976 & West Supp. 1983). The 14th and 15th amendments to the Constitution first guaranteed minority voting rights. Stronger enforcement mechanisms were needed, however, because, nearly 100 years after their adoption, numerous practices, including physical intimidation, use of rigged literacy tests, special registration requirements, poll taxes, and racial gerrymandering, still almost totally excluded minorities from the political process in many areas. U.S., Commission on Civil Rights: Report (1959), pp. 27-142; Voting (1961), pp. 21-142; and The Voting Rights Act...The First Months (1965), pp. 6-10. For the continuing need for stronger voting rights measures and more vigorous enforcement, see U.S., Commission on Civil Rights: The Voting Rights Act: Ten Years After (1975), pp. 69-356 (hereafter cited as Ten Years After) and The Voting Rights Act: Unfulfilled Goals (1981), pp. 22-93 (hereafter cited as Unfulfilled Goals).

object if the jurisdiction cannot prove an absence of discriminatory purpose or effect. 25/ The Division also is responsible for sending Federal officials, called examiners and observers, to register voters and watch for possible denials of voting rights in jurisdictions designated by the Attorney General, 26/ for ensuring the electoral process is open to citizens who do not read or speak English, 27/ and for filing suits where necessary to enforce voting guarantees. 28/ These responsibilities have been increased by the 1982 Voting Rights Act amendments. 29/

Historically, division enforcement of the act often has

25/ Under section 5 of the act, jurisdictions meeting certain criteria reflecting pervasive, overt voting rights discrimination in the past must have such changes cleared by the Justice Department or the Federal District Court for the District of Columbia before they may carry them out. 42 U.S.C. §1973c (1976).

26/ 42 U.S.C. §§1973d, f (1976).

27/ Under section 203 of the act, jurisdictions having a certain percentage of language-minority citizens legally classified as illiterate are required to provide election materials in the applicable minority language as well as in English. 42 U.S.C. §§1973aa-1a(b) to (c) (1976 & West Supp. 1983). Section 4(f)(4) of the act prohibits English-only elections in certain other jurisdictions. 42 U.S.C. §1973b(f)(1) (1976).

28/ Id. at §1973aa-2.

29/ Amended section 2, which covers all jurisdictions, establishes a prohibition against voting practices with discriminatory results, thereby expressly authorizing more extensive and complex litigation. 42 U.S.C.A. §1973b (West Supp. 1983). The amended act also requires the Division to ensure that blind, disabled, and illiterate voters receive voting assistance from persons of their choice. Id. at §1973aa-6.

been reactive, leaving the task of identifying and seeking remedies for many serious problems to private citizens and groups. 30/ As discussed below, the Division recently has taken steps toward more affirmative enforcement. In the Commission's view, however, further improvements and resources to carry them out would be required to provide the comprehensive guarantees of full political participation intended by the Voting Rights Act.

For example, the Division has processed large volumes of preclearance requests. 31/ It also has expanded efforts to

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30/ U.S., Commission on Civil Rights: Political Participation (1968), pp. 164-65, 175-76; Ten Years After, pp. 338, 347; and FY 83 Budget Report, p. 35. This longstanding problem apparently persisted through 1982. In that year, the Division initiated only 2 of the 13 voting rights cases in which it participated. The Division expected to initiate more suits in FY 83, though it did not have additional voting rights staff. CRD FY 84 Budget, p. 177. To this end, it established a task force to concentrate on developing suits for enforcing amended section 2. William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, Sept. 21, 1983 (hereafter cited as Reynolds September Letter). It is too soon to determine whether this step significantly will reduce the burden of documenting voting rights violations and initiating suits thus far often borne largely by private organizations.

31/ In 1982, it processed over 2,900 such requests involving well over 13,000 proposed changes. CRD FY 84 Budget, p. 176; Special Analysis J, p. J-7. The Division reports a timely response to every request but notes it was able to keep up with the workload only by using staff normally assigned to other enforcement functions, requiring substantial overtime, and other extraordinary personnel measures. Reynolds October Letter, p. 4. Somewhat fewer requests are expected in FY 84. CRD FY 84 Budget, p. 176. It is unclear whether the Division will have the resources to handle in a more routine manner what still will be a very large volume.

identify jurisdictions that fail to submit required requests and developed a procedure for monitoring responses to its objections. 32/ It, however, still lacks the resources to ensure all voting changes are submitted for preclearance reviews and, thus, must continue relying on private parties to call violations to its attention. 33/ It also lacks information to identify the extent of compliance with bilingual

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32/ Reynolds September Letter, pp. 3-4. For the need for procedures to identify such violations systematically, see Ten Years After, p. 347; Unfulfilled Goals, p. 93; FY 83 Budget Report, p. 35.

33/ Reynolds September Letter, p. 4. The Division emphasizes it has made systematic efforts to require that jurisdictions seek preclearance. Reynolds October Letter, p. 2. As described, however, comprehensive efforts extend only to Mississippi and Louisiana and only to county redistricting plans in those States. Ibid. The Division also reports it is reviewing session laws in covered States to identify unsubmitted changes. Reynolds September Letter, p. 3. This program would enable it to identify only State and some county changes. It would not detect any changes at the municipal level. The Division acknowledges it lacks the resources to identify all unsubmitted changes. Ibid., p. 4.

requirements of the act. 34/

Under this administration, examiners have been sent to register voters in 8 counties, the first time this authority has been used since 1975. 35/ The Division also has continued sending observers to selected counties. 36/ The

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34/ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, testimony, Hearings on Amendments to the Voting Rights Act of 1965, before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982) p. 1658. Division reports on recent voting rights accomplishments and plans indicate no attention to this area. U.S., Department of Justice, "General Legal Activities," report submitted under OMB Circular No. A-11-53 for the FY 84 budget cycle, undated; CRD FY 84 Budget, pp. 176-78. The Division notes that primary responsibility for enforcing the language minority provisions has been delegated to U.S. attorneys, though it remains responsible for enforcing these provisions in jurisdictions also covered by other special provisions of the Voting Rights Act. Reynolds September Letter, pp. 7-8. It believes reviews of plans these jurisdictions submit are an effective method of assuring compliance. Ibid, p. 8. Such reviews, however, would not identify all instances of noncompliance or indicate possible needs to increase oversight of and resources for activities delegated to U.S. attorneys. For evidence that more effective monitoring is required, see Unfulfilled Goals, pp. 84-86.

35/ U.S., Department of Justice, Civil Rights Division, press releases, Sept. 3, 1982 and June 20, 1983; William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division (speech delivered before the Southern Christian Leadership Conference, Washington, D.C., Aug. 26, 1983), p. 9.

36/ Gerald W. Jones, Chief, Voting Rights Section, Civil Rights Division, letter to Ronald D. Henderson, Acting Assistant Staff Director for Program and Policy Review, U.S. Commission on Civil Rights, June 23, 1983; William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 9, 1983, p. 7 (hereafter cited as Authorization Testimony).

persistence of widespread barriers to registration, voting, fair representation, and candidacy, however, suggests Federal examiners and observers may be needed in more jurisdictions. 37/

As in the past, the Division appears to have responded selectively and sometimes slowly to problems brought to its attention. At the invitation of a major civil rights group, for example, the Assistant Attorney General for Civil Rights recently took a fact-finding tour and committed the Division to combatting interference with minority voting in Mississippi. 38/ Observers, examiners, and Division staff then

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37/ For numerous examples of such problems, see Unfulfilled Goals, pp. 22-63. The Division notes that Commission reports are not an adequate basis for sending out examiners and that it followed up and found no need for them in several counties where the Commission identified problems, including Claiborne County, Mississippi. Reynolds October Letter, p. 3. Barriers to registration the Commission found in that county were localized in the city of Port Gibson. Unfulfilled Goals, pp. 23-24. Data the Division cites indicating no problems in Claiborne County, specifically black electoral successes, do not describe the situation in that city. Reynolds October Letter, p. 3; Unfulfilled Goals, pp. 45-46. The Commission asked the Division how it decided whether examiners or observers were needed. Clarence M. Pendleton, Chairman, U.S. Commission on Civil Rights, letter to William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, July 12, 1983. The Division's response did not clearly indicate what criteria, beyond basic statutory requirements, it used for targeting. Reynolds September Letter, pp. 4-7. For previous Commission concerns about inadequate use of examiners and observers, see Political Participation, pp. 175, 180-81; Ten Years After, pp. 33-37, 338, 348.

38/ Washington Post, June 16, 1983, p. A-1; June 17, 1983, p. A-1; June 18, 1983, p. A-2.

were sent to primary elections on 3 occasions. 39/ This response followed shortly on the fact-finding tour. The Commission and other sources, however, had documented deterrents to registration, harassment of candidates, and other problems calling for a Division presence in Mississippi as early as 1981. 40/

The Division has improved preclearance recordkeeping as well as monitoring and plans further improvements. 41/ Without more resources, however, it probably will remain unable systematically to identify voting changes made without required preclearance reviews, monitor compliance with other provisions of the act comprehensively, or target all jurisdictions where Federal examiners and observers should be sent. The proposed

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39/ U.S., Department of Justice, press releases, Aug. 1, 1983; Aug. 8, 1983; Aug. 22, 1983.

40/ Unfulfilled Goals, pp. 23-24, 35, 58-59. For other sources see, for example, Lawyers' Committee for Civil Rights Under Law, Voting in Mississippi: A Right Still Denied (1981). See also testimony of Dr. Aaron Henry, President, Mississippi NAACP; Frank Parker, Esq., Lawyers' Committee for Civil Rights Under Law; Charles V. McTeer, Esq., Henry Kirksey, Mississippi State Senator, and Martha Bergmark, Member, Mississippi State Advisory Committee to U.S. Commission on Civil Rights; and Professor Howard Ball, Mississippi State University, Hearings on the Extension of the Voting Rights Act, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess. (1981), pp. 470-76, 489-99, 1682-89, 2075-88.

41/ The Division reports it has transferred paper records of preclearance requests to microfiche. It also reports the General Accounting Office (GAO) is studying its recordkeeping systems and that it will consider further modifications based on GAO's recommendations. CRD FY 84 Budget, pp. 176-77. As of October 11, 1983, the Division expected the study to be released shortly. Reynolds October Letter, p. 2.

FY 84 budget does not specify funds to develop the needed information systems. 42/

The Division has announced plans to increase voting rights enforcement activities, including litigation, and requested 12 additional staff to carry them out, a 17.6 percent increase over the current staffing level. 43/ It is doubtful whether this increase would be sufficient to correct longstanding deficiencies and meet the increased demands entailed by the 1982 amendments. Suits to enjoin practices with discriminatory results, for example, take considerable staff time to develop and litigate. 44/ Additional staff time, meanwhile, will be required to implement other amendments to the act fully. 45/ Suits by jurisdictions seeking exemption from the act's

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42/ For the voting rights enforcement program, additional funds for management information requested for FY 84 apparently would go toward modernizing storage and retrieval of existing records, not toward collecting and analyzing additional types of information. CRD FY 84 Budget, p. 189.

43/ CRD FY 84 Budget, p. 177.

44/ The Division notes it has not been unusual for an entire attorney workyear to be spent on just two such cases. Ibid.

45/ Vigorous enforcement of the new voter assistance provision, for example, might entail notifying State and local jurisdictions of the change in the law, identifying needed amendments to State voter assistance statutes and encouraging their enactment, and instituting procedures for systematically monitoring local compliance. The Division plans only to notify each State of the voter assistance requirements and incorporate them into its observer program. Reynolds September Letter, p. 9. It reports having acquired no information indicating potential compliance problems in this area. Ibid.

special provisions also are likely to absorb more staff time than formerly. 46/ Despite increased efficiencies and commitment, therefore, the Division's ability to strengthen its program for enforcing voting rights protections would remain limited under the proposed FY 84 budget.

Other Enforcement Issues

There has been considerable debate over the last several years about the Civil Rights Division's activities in voting rights and other areas. 47/ Evaluating the Division's total performance is very difficult because it involves numerous actions at various stages of the enforcement process and often subtle distinctions on complex points of law and fact.

46/ Ibid., p. 8. The 1982 amendments established new procedures by which jurisdictions covered by the special provisions may seek an exemption based on a number of specified criteria for good behavior. 42 U.S.C.A. §1973b(a) (West Supp. 1983). These could encourage more jurisdictions to seek such an exemption. Additional staff time would be required not only because there would be more cases, but because each would have to be evaluated by more complex standards than before. The Division has requested more positions for voting rights enforcement in part because it expects a greater litigation workload under the new exemption procedures. Reynolds September Letter, p. 8.

47/ For examples of criticisms of the Division's performance and Division responses, see generally Leadership Conference on Civil Rights, "Without Justice" (February 1982); U.S., Department of Justice, "The Civil Rights Policy of the Department of Justice: A Response to the Report of the Leadership Conference on Civil Rights" (April 1982); Washington Council of Lawyers, "Reagan Civil Rights: The First Twenty Months," undated; U.S., Department of Justice, Civil Rights Division, "Correcting the Record of Civil Rights Enforcement, January 20, 1981 to September 30, 1982: A Response to the Report of the Washington Council of Lawyers" (November 1982).

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The Division undoubtedly has been involved in many cases. 48/ For example, it has filed 104 cases prosecuting criminal civil rights violations, reportedly a record number. 49/ FY 82 achievements in this area included indictments of 17 individuals for violations of prohibitions against involuntary servitude or peonage, over 3 times the number of individuals indicted on such counts in FY 80. 50/ The Division also reports significant actions against New Orleans police who participated in a reign of terror in a black neighborhood, border patrol officers who sexually abused alien women, and hate group members involved in racially motivated murders. 51/

Since this administration took office, the Division also has filed 24 new employment cases and, at the Supreme Court level, been involved in 12 others, 52/ including TIAA-CREF v. Spirt, in which the Division supported a challenge to

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48/ For a recent summary of the Division's record, see William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, statement before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 8, 1983 (hereafter cited as Authorization Statement).

49/ Ibid., p. 3.

50/ Special Analysis J, p. J-6.

51/ Reynolds October Letter, p. 5.

52/ Ibid., p. 7; Authorization Statement, p. 6. The Division also reports obtaining consent decrees in 31 employment cases, many involving major employers and substantial relief, including the largest back pay award Justice ever obtained against a public employer. Reynolds October Letter, pension plans paying lower monthly benefits to women than men. 53/ In addition, it reports participation in 8 suits brought under Section 2 of the Voting Rights Act and maintained or increased activity in other major areas 54/

Sheer numbers of investigations conducted and suits filed or joined, however, do not adequately indicate whether resources have been committed to effective civil rights enforcement. The Division has a special role to fulfill in developing new areas of case law to strengthen enforcement. Under this administration, it has not altogether neglected such ground-breaking cases. For example, it has pursued a case, developed during the previous administration, against Yonkers,

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53/ See Brief for the Equal Employment Opportunity Commission as Respondent and for the United States as Amicus Curiae in Support of Respondents, Teachers Ins. and Annuity Ass'n and College Retirement Equities Fund v. Spirt, ___ U.S.___ 103 S. Ct. 3565 (1983) (mem.), *vacating and remanding* 691 F.2d 1054 (2d Cir. 1982) (action taken in light of Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation v. Norris, 463 U.S. ___, 103 S. Ct. 392 (1983). For Commission views supporting Federal policies against pension plans using sex-based actuarial tables, see, for example, U.S., Commission on Civil Rights: *The Federal Civil Rights Enforcement Effort--1974*, vol. V, *To Eliminate Employment Discrimination* (1975), pp. 247-48; *The Federal Civil Rights Enforcement Effort--1977, To Eliminate Employment Discrimination: A Sequel* (1977), pp. 316-20; and "Staff Comments on Proposed Rule (Affirmative Action Requirements for Government Contractors) Issued by the Department of Labor, Office of Federal Contract Compliance Programs," Oct. 26, 1981. See also Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to Drew S. Days III, Assistant Attorney General, Civil Rights Division, Aug. 18, 1980.

54/ Reynolds September Letter, pp. 1-2; Authorization Statement, pp. 7-12.

New York, that links discrimination in housing and education. 55/ Following the same basic approach, it also has initiated the first Federal government suit linking fair housing and equal employment violations. 56/

In other significant cases, however, the Division has sought to reverse longstanding Federal policies providing broad civil rights protections and adequate remedies. 57/ These cases involve complex issues and at times inconclusive precedents. The Commission, therefore, carefully has analyzed the Division's positions as each developed. 58/ It found

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55/ See United States v. Yonkers Bd. of Education, No. 80-CIV. 6761 (S.D. N.Y. filed Dec. 1, 1980, amended Dec. 14, 1981).

56/ United States v. Town of Cicero, No. 83-C413 (N.D. Ill. filed Jan. 27, 1983). See also Authorization Statement, p. 12. In response to an earlier draft of this chapter, the Division said the discussion of innovative cases is incomplete and suggested other examples to include. Reynolds October Letter, pp. 4-6. It, however, did not provide enough information for Commission staff to review the cases and determine in what respects they represented new approaches that could broaden litigation by the Federal government and private parties.

57/ The Division views controversies over its performance as mainly differences of opinion over appropriate remedies. Authorization Statement, p. 1. In a number of cases discussed below, however, remedies were not the critical issue.

58/ The Division objected to a draft of this discussion for lack of objectivity and said it should present an explanation of the Division's positions and where the Commission believes they depart from "the national consensus and agenda." Reynolds October Letter, p. 6. The Division's positions, the reasoning behind them, and the Commission's views, all summarized here, are fully presented in correspondence and other documents cited below. Copies of these materials are available in Commission files.

the Division repeatedly adopting narrow interpretations of Federal civil rights laws in preference to broad interpretations the Division itself had labored to establish in previous administrations. To this extent, the Commission believes the Division has not only made questionable use of its own resources, but jeopardized other agencies' capacities to use their resources effectively.

In *Bob Jones University* v. *United States* and *Goldsboro Christian Schools* v. *United States*, for example, it opposed the well-established Federal policy denying tax exemptions to racially discriminatory private schools. 59/ Consistent with current Division policies, Justice also abandoned its lower court position that constitutional equal protection

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59/ See Memorandum for the United States, Bob Jones Univ. v. United States, ___ U.S. ___ 103 S. Ct. 2017 (1983). The Division decided to withdraw support for this policy because Congress had not expressly granted the Internal Revenue Service authority to enforce nondiscrimination by withholding tax exemptions. Reynolds October Letter, p. 9. For the Commission's view that the Division disregarded constitutional and statutory responsibilities in this action, see U.S., Commission on Civil Rights: "Statement on the Administration's Decision to Revoke Its Revenue Rules and to Grant Tax-Exempt Status to Schools that Discriminate on the Basis of Race," Jan. 19, 1982 and *Discriminatory Religious Schools and Tax Exempt Status* (1982). See also Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Jan. 28, 1982.

guarantees prohibit the denial of education to alien children not lawfully admitted into the country. 60/

Although the Supreme Court rebuffed these efforts to reduce the scope of Federal civil rights protections, the Division has continued pressing for restrictive decisions in other areas.

60/ In its Supreme Court brief, Justice asserted that alien children not lawfully admitted into the United States are "persons" under the Equal Protection Clause but, claiming it was not an issue affecting the United States, refrained from taking a position on whether the clause requires States to provide free education to such children. See Brief for the United States in No. 80-1934, Plyler v. Doe, In Re: Alien Children Education Litigation, Texas v. Certain Named and Unnamed Undocumented Alien Children, 457 U.S. 202 (1982). According to the Division, it merely decided not to address the application of the 14th amendment to the particular facts of the case at the Supreme Court level. Reynolds October Letter, p. 10.

In the lower courts in these cases, the Division argued that the State statute permitting local school districts to charge tuition to alien children not lawfully admitted into the country was invalid under the Equal Protection Clause. See Brief for the United States as Amicus Curiae, Plyler v. Doe, 628 F.2d 448 (5th Cir. 1980); Brief for the United States, In Re: Alien Children Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) (the Government filed a friend-of-the-court brief in Plyler and intervened as a plaintiff in Alien Children). For concerns that this and related actions signaled an abandonment of Federal civil rights leadership, see Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to the President, Feb. 12, 1982 (hereafter cited as Equal Educational Opportunity Letter).

As a result, the Government now is urging the Supreme Court, in *Grove City College* v. *Bell*, to limit Federal protections against sex discrimination in education under Title IX of the Education Amendments of 1972. 61/ Again reversing well-established policies, it seeks a ruling that would permit widespread denials of equal educational opportunity for women and jeopardize protections against race, handicap, and age

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61/ See Brief of Respondents, Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983) (No. 82-792). Title IX, 20 U.S.C. §1681 (1976), prohibits sex discrimination in federally-assisted education programs. The Division notes it argued that Grove City was required to file an assurance of compliance with Title IX because the college received assistance through Federal student aid but felt obliged to advise the Supreme Court against upholding the broad reading of Title IX coverage in the lower court opinion. Reynolds October Letter, p. 10. The Division explains that it believes court decisions holding that a single dollar of Federal aid subjects every school activity to Federal regulation are inconsistent with Congressional intent and Supreme Court precedents. Ibid. The appellate decision it opposes in *Grove City* was not so expansive, however. See Grove City College v. Bell, 687 F.2d 684, 688, 689 n. 9 (3d Cir. 1982).

discrimination in all programs supported by Federal tax dollars. 62/

The Commission believes the Division also jeopardized these protections by abandoning support for the established interpretation that Title VI can be violated by policies that have discriminatory effects, regardless of intent, when this policy faced a major Supreme Court challenge in Guardians

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62/ Title IX is linked by language, legislative history, and case law to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-2000d-6 (1976 & Supp. V 1981), section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (Supp. V 1981), and the Age Discrimination Act of 1975, 42 U.S.C. §§6101-6107 (1976 & Supp. V 1981). These laws bar discrimination based on race, color, national origin, handicap, and age in all types of programs aided by Federal funds. Because all the laws are related, a changed interpretation of one is likely to affect the others.

For Commission concerns about Division actions leading up to the policy reversal in Grove City and justifications for the established policies see, for example, U.S., Commission on Civil Rights: "Statement on Administration Decision Not to Appeal University of Richmond v. Bell," Sept. 15, 1982 and Statement on Civil Rights Enforcement in Education, June 14, 1983; Equal Educational Opportunity Letter; Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letters to the President, Jan. 6, 1983 and June 14, 1983, letters to William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Sept. 30, 1982 and Dec. 3, 1982, and letter to William French Smith, Attorney General, May 4, 1983. For implications of the government's position in Grove City, see also U.S., Commission on Civil Rights, "Statement on the Government's Brief in Grove City College v. Bell," Aug. 9, 1983 and Mary Frances Berry, Member, U.S. Commission on Civil Rights, statement before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 18, 1983.

Association v. Civil Service Commission. 63/ The Division, moreover, has chosen to restrict fair housing enforcement to cases of intentional discrimination although Title VIII

63/ __U.S.__, 103 S. Ct. 3221 (1983). Justice supported the established policies at the appellate level. See Brief for the United States as Amicus Curiae, Guardians Ass'n v. Civil Service Comm'n, 633 F.2d 2321 (2d Cir. 1980) (joining plaintiffs in urging a rehearing of the ruling of the Court of Appeals on the Title VI issue). According to the Division, it decided not to take a similar position at the Supreme Court level because of conflicting Federal agency views. Reynolds October Letter, p. 10. For Commission recommendations that Justice maintain its former position, see Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Rex E. Lee, Solicitor General, May 10, 1982. The Supreme Court's ruling permits the established policies. See Guardians Ass'n v. Civil Service Comm'n, __ U.S. ___, 103 S. Ct. 3221, 3227 (J. White), 3240-43 (J. Marshall, dissenting), 3255 (J. Stevens, dissenting, joined by JJ. Brennan and Blackmun) (1983).

For examples of various types of discrimination that can occur in the absence of intent, see U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. IV, To Provide Fiscal Assistance (1975), p. 34 (hereafter cited as To Provide Fiscal Assistance) and Affirmative Action in the 1980s: Dismantling the Process of Discrimination (1981), pp. 6-14 (hereafter cited as Affirmative Action in the 1980s). See also J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, "Managing Title VI Programs" (speech before Department of Transportation Regional Civil Rights Officials), Nov. 8, 1974, cited in To Provide Fiscal Assistance, p. 35.

requires no such limit. 64/

The Division also has reversed longstanding Federal support for remedies the Commission considers necessary to eliminate the effects of illegal discrimination. It has opposed pupil transportation remedies 65/ even though they are used only when

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64/ William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, letter to John Knapp, General Counsel, Department of Housing and Urban Development, Mar. 4, 1983. The Division formerly argued that Title VIII, 42 U.S.C. §§3601-3631 (1976 & Supp. V 1981), prohibits actions with discriminatory effects. See, e.g., United States v. City of Birmingham, 538 F. Supp. 819, 827 n. 9 (E.D. Mich. 1982). It has abandoned this position and now intends to act only in cases of purposeful discrimination unless the Supreme Court rules for an effects test. *Id.*; Reynolds October Letter, p. 9. The Division believes this more restrictive policy is supported by the language and legislative history of Title VIII and by a lack of consensus among lower court opinions. Reynolds October Letter, pp. 9-10.

An overwhelming number of appellate courts that have considered the issue in recent years, however, have held that violations of Title VIII may be established through demonstration of racially discriminatory effects. See, e.g., Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); United States v. City of Parma, 661 F.2d 562, 575-76 (6th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972, *rehearing denied*, ___ U.S. ___, 102 S. Ct. 2308 (1982); Robinson v. 12 Lofts Realty, Inc. 610 F.2d 1032, 1038 (2d Cir. 1979); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Housing Redevelopment Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). But see Skillken & Co. v. City of Toledo, 558 F.2d 350, 873-82 (6th Cir. 1977); Boyd v. Lefrak, 509 F.2d 1110, 1113-14 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975).

65/ Authorization Statement, p. 10.

other techniques alone would not eliminate school segregation. 66/ In Washington v. Seattle School District No. 1, for example, the Division under this administration switched sides and urged the Supreme Court to let States prohibit local voluntary plans of this type. 67/ It also has attempted to overturn court orders requiring pupil

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66/ The Division opposes pupil transportation remedies because it believes they result in enrollment losses that tend to resegregate school systems and undermine community support for public education. It believes plans that instead emphasize incentives, such as magnet schools, will promote lasting desegregation more effectively. Authorization Testimony, p. 15. For prevailing case law on the need for pupil transportation remedies to eliminate unconstitutional segregation, the limited effectiveness of remedies relying on voluntary pupil transfers, other problems with magnet schools, and concerns about the Division's policies in this area, see U.S., Commission on Civil Rights, Statement on School Desegregation, Dec. 7, 1982.

67/ See Memorandum for the United States, Washington v. Seattle School Dist. No. 1, ___U.S.___, 102 S. Ct. 3187 (1982). The Supreme Court upheld Seattle's voluntary pupil transportation plan. On the same day, however, it sustained another State statute limiting pupil transportation remedies in Crawford v. Bd. of Educ. of Los Angeles, ___U.S.___, 102 S. Ct. 3211 (1982). The Justice Department had filed a friend-of-the-court brief and presented oral argument in support of the school board seeking the limitation.

transportation and plans negotiated under them. 68/

Similarly, the Division has pursued a policy against plans involving affirmative remedies that, in the Commission's view, are needed to eliminate the effects of employment discrimination. It has sought to limit remedies to identifiable victims of discrimination, 69/ even though

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68/ The Division, for example, unsuccessfully supported the request of Nashville, Tennessee for Supreme Court review of a court order requiring pupil transportation. See Brief for the United States as Amicus Curiae in Support of Petitioners, Metropolitan County Bd. of Educ. v. Kelley, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, ___U.S.___, 103 S. Ct. 834 (1983). It also argued against an existing plan requiring pupil transportation in East Baton Rouge, Louisiana. See Submission of the United States, Davis v. East Baton Rouge Parish School, No. 1662-B (M.D. La. filed Dec. 10, 1982). For Commission concerns about these actions, see *Statement on School Desegregation*. For concerns about earlier actions indicating changes in Division policies on pupil transportation, see U.S., Commission on Civil Rights, *With All Deliberate Speed: 1954-19??* (1981) and Equal Educational Opportunity Letter.

69/ See, e.g., Brief of the United States as Intervenor-Appellee on Rehearing En Banc, Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982) (*en banc* decision pending) (hereafter cited as Brief of U.S., Williams v. New Orleans); Motion of the United States to Intervene as a Party Appellant and Suggestion of Rehearing En Banc for the United States as Intervenor-Appellant, Bratton v. City of Detroit, 704 F.2d 878, *vacated in part and remanded*, Daily Lab. Rep. (BNA) No. 117 at A-5 (6th Cir. 1983) (intervention of U.S. and hearing *en banc* denied) (hereafter cited as Motion of U.S., Bratton v. Detroit). The Division equates broader prospective remedies with preferential treatment and stereotyping and believes they give individuals belonging to groups that have been discriminated against "a gratuitous advantage" at the expense of other individuals' rights. William Bradford Reynolds, "Fourth Annual Houston Lecture" (speech delivered at Amherst College, Amherst, Mass. Apr. 29, 1983), pp. 15-17 (hereafter cited as Reynolds Amherst Speech); Reynolds SAC Speech, pp. 9-10. For a contrary view, see *Affirmative Action in the 1980s*.

this approach would not achieve integration as the Commission believes envisioned by Federal civil rights laws. Pursuing Division policy, Justice argued in the Supreme Court against court-ordered modifications of seniority plans designed to preserve minority gains in formerly discriminatory organizations. 70/ In some cases, Justice has broadened its opposition to include almost all affirmative steps, except aggressive recruitment efforts, designed to eliminate the

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70/ See Brief for the United States As Amicus Curiae in Support of Petitioners, Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir. 1982) cert. granted sub. nom. Firefighters Local Union No. 1784 v. Stotts, ___U.S.___, 103 S. Ct. 2451 (1983); Brief for the United States As Amicus Curiae in Support of Petitioners, Boston Firefighters Union Local 718 v. Boston Chapter NAACP, ___U.S.___, 103 S. Ct. 2076 (1983). For the need for such plans, see U.S., Commission on Civil Rights: Last Hired, First Fired: Layoffs and Civil Rights (1977), pp. 60-71 and Affirmative Action in the 1980s, p. 36. For arguments in favor of such plans and Commission concerns about Justice Department opposition to them see U.S., Commission on Civil Rights, "Statement on the Memphis 'Last Hired, First Fired Case," Sept. 12, 1983; Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, letter to Rex E. Lee, Solicitor General, Dec. 7, 1982.

results of past discrimination. 71/ In the process, it has jeopardized countless court-ordered plans already in effect and undermined the Equal Employment Opportunity Commission's

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71/ See, e.g., Brief of U.S., Williams v. New Orleans; Motion of U.S., Bratton v. Detroit. For the broad implications of the Division's arguments in Williams, see U.S., Commission on Civil Rights, "Statement on Department of Justice's Position in New Orleans Police Case," Jan. 11, 1983. The Division believes affirmative recruitment efforts, combined with nondiscriminatory selection procedures, are the only appropriate remedies for underrepresentation or maldistribution due to discrimination in employment. It opposes numerical goals and timetables to measure the success of these efforts and other remedies that establish proportional representation when members of protected groups have been illegally excluded. Reynolds Amherst Speech, p. 18; Reynolds SAC Speech, pp. 7-9. The Division requested that the effectiveness of its approach be noted. The information it provided, however, was not complete enough to evaluate the remedies it prefers. Reynolds October Letter, p. 8; James Sullivan, Legislative Counsel, Civil Rights Division, telephone interview, Oct. 26, 1983 (hereafter cited as Sullivan Oct. 26 Interview).

authority. 72/

Coordination

In 1980, the President assigned the Justice Department substantially increased responsibilities for coordinating civil rights enforcement in federally-assisted programs. 73/

72/ The Equal Employment Opportunity Commission (EEOC) is responsible for providing leadership and coordination in the development and enforcement of Federal equal employment requirements. Exec. Order No. 12,067, 3 C.F.R. 206 (1979) *reprinted in* 42 U.S.C. §2000e app. at 668-69 (Supp. V 1981). Pursuant to this responsibility, EEOC prepared a friend-of-the-court brief supporting the affirmative promotion plan challenged in *Williams* v. *New Orleans*. The Justice Department not only filed an opposing brief, but prevented EEOC from filing its brief. For the Commission's view that EEOC should have been permitted to file, see Mary Louise Smith, Vice Chairman, U.S. Commission on Civil Rights, letter to the President, Apr. 13, 1983.

Justice also has refused, as a matter of principle, to comply with EEOC requirements for goals and timetables in Federal agency affirmative action plans. Kevin D. Rooney, Assistant Attorney General for Administration, Department of Justice, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 10, 1983 (hereafter cited as Rooney Letter). For concern that Justice is setting an example of noncompliance, see John Hope III, Acting Staff Director, letter to William French Smith, Attorney General, July 1, 1983. The Department believes EEOC's requirements are unauthorized and that its hiring record, except with regard to handicapped persons, sets a laudable example for other employers. Rooney Letter. For EEOC's view that its requirements are appropriate and necessary, see Bureau of National Affairs, *Daily Labor Report*, Sept. 8, 1983, pp. A-5, A-6.

73/ Exec. Order No. 12,250. The Department has had responsibilities for coordinating Title VI enforcement almost since the law was passed. See Exec. Order No. 11,197, 3 C.F.R. 278 (1964-1965 Compilation); Exec. Order No. 11,247, 3 C.F.R. 348 (1964-1965 Compilation), *reprinted in* 42 U.S.C. §2000d(1970); 42 U.S.C. §2000d (1970); Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975 Compilation), *reprinted in* 42 U.S.C. §2000d-1 app. at 1228 (1976). Executive Order No. 12,250, issued in late 1980, strengthened the Department's Title VI authority and gave it comparable authority for coordinating enforcement of Title IX, section 504, and nondiscrimination provisions in statutes governing particular Federal assistance programs. For improvements in this order over the previous orders, see Exec. Order No. 12,250 Comments.

This expanded authority, delegated to the Civil Rights Division, held out the promise of eliminating inconsistencies, delays, deficient requirements, and, in some areas, sheer inertia that long had denied many victims of discrimination their rights to relief. 74/ The Division, however, did not gain enough staff to address all these problems adequately. 75/ Division policies now have compounded resource-related problems in the coordination effort.

74/ For examples of such problems, see U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. III, To Ensure Equal Educational Opportunity (1975) and vol. VI, To Extend Federal Financial Assistance (1975) (hereafter cited as To Extend Federal Financial Assistance); Exec. Order No. 12,250 Comments; and FY 83 Budget Report, p. 38. See also U.S., General Accounting Office, Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI (1980); National Advisory Council on Women's Educational Programs, The Unenforced Law: Title IX Activity By Federal Agencies Other Than HEW (1978).

75/ Comprehensive plans the Division developed for carrying out its enlarged coordination responsibilities were based on 57 staff positions. Drew S. Days III, Assistant Attorney General, Civil Rights Division, memorandum to heads of Federal departments and agencies, Dec. 2, 1980 (hereafter cited as Proposed Implementation Plan), attached "Office of Coordination and Review Proposed Organizational Structure." For doubts this staffing level would be adequate, see Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to Stewart B. Oneglia, Director, Office of Coordination and Review, Civil Rights Division, Dec. 12, 1980 (hereafter cited as Implementation Plan Comments). The Division's coordination section never has had more than the equivalent of 42 staff and would remain at this level under the proposed FY 84 budget. William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 22, 1983. The Division believes the original estimate of coordination staff needed was too high and that the current level is adequate. Reynolds October Letter, p. 11.

The Division's first priority under the new order was to issue Government-wide regulations establishing adequate and consistent standards for all Federal assistance agency civil rights regulations and programs. 76/ These would have provided the basis for requiring agencies to issue regulations, where lacking, and improve existing regulations. 77/ The Division planned five sets in all: regulations specifying general enforcement procedures, section 504 regulations for federally-assisted programs, section 504 regulations for federally-conducted programs, updated and clarified Title VI regulations, and regulations on civil rights enforcement in programs assisted under block grants. 78/ Lacking resources to

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76/ Proposed Implementation Plan, pp. 1-3.

77/ When the new order was issued, only 3 of the more than 20 agencies with Title IX responsibilities had published final regulations. Fewer than one-quarter of the responsible agencies had final section 504 regulations for federally-assisted programs, and no agency had section 504 regulations for federally-conducted programs. Exec. Order No. 12,250 Comments. The Division had been working for several years on needed improvements in its government-wide Title VI regulations. Ibid. These would have provided a model for revised agency regulations.

78/ Proposed Implementation Plan. It was not clear from the plan whether government-wide Title IX regulations also would be developed. Implementation Plan Comments, p. 2. The coordination section, in fact, had no immediate plans for them. Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, interview, Mar. 4, 1983 (hereafter cited as Oneglia Interview). The Division reports that experience has led it to modify its estimate of the number of sets of regulations required. Reynolds October Letter, p. 11.

develop them all simultaneously, the coordination section concentrated on the first two sets of regulations. 79/

Division efforts to narrow rather than improve the section 504 regulations raised such concerns among protected groups that work on both sets of regulations ultimately was halted. 80/ Plans to develop the remaining sets of regulations also have been deferred indefinitely, as have plans for the compliance manual. 81/ Even without new coordination

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79/ Oneglia Interview. Once approved, these were to provide the basis for the remaining regulatory proposals and for supplementary guidance, such as a government-wide compliance manual to establish further consistency in agencies' enforcement procedures. Ibid. Assuming 57 staff, the coordination section orginally planned to complete all sets of regulations needed by FY 83. Proposed Implementation Plan.

80/ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division (speech delivered at the 1983 Convention of the Disabled American Veterans, Los Angeles, Calif., Aug. 1, 1983), pp. 4-5 (hereafter cited as Reynolds DAV Speech); U.S., Department of Justice, "Federally Assisted Regulation," Civil Rights Forum, Summer 1983, p. 3 (hereafter cited as "Federally Assisted Regulation"). The Division, however, has suggested that changes in existing section 504 regulations may be sought through litigation. Reynolds DAV Speech, p. 5; Reynolds October Letter, p. 13.

81/ "Federally Assisted Regulation;" Oneglia Interview. For the need for prompt issuance of government-wide section 504 and Title IX regulations, see Exec. Order No. 12,250 Comments. For potential civil rights enforcement problems in block grants that could require particular regulatory guidance, see U.S., Commission on Civil Rights, Civil Rights: A National, Not a Special Interest (1981), pp. 105-16. For civil rights deficiencies in agencies' current block grant regulations, see John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letters to Richard S. Schweiker, Secretary of Health and Human Services, Dec. 4, 1981 and Terrel H. Bell, Secretary of Education, Apr. 13, 1982.

regulations, the Division can review and recommend changes in agency rules, as it has in the past. 82/ It, however, will not have formal standards requiring agencies to correct some major persistent deficiencies. 83/

The Division did complete one regulation that may reduce duplication and target enforcement resources more effectively. 84/ Other needed standards, however, have not been and apparently will not soon be issued. The coordination

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82/ Though defective, there are Title VI coordination regulations in force. See 28 C.F.R. §§42.401-.415 (1982). The Division also has section 504 coordination regulations for federally-assisted programs because, pending completion of new regulations, the Attorney General adopted guidelines formerly issued by the Department of Health, Education, and Welfare. Reynolds October Letter, p. 13. The Division also can establish consistency through comments on particular proposals. It reports considerable activity in this area. Ibid., pp. 11-12.

83/ For example, excessive delays in taking enforcement action when negotiations produce no resolution have been a longstanding problem. To Extend Federal Financial Assistance, p. 758. As required by the order, the Division's draft regulations on enforcement procedures would have established time limits for negotiations. Exec. Order No. 12,250, §1-204; U.S., Department of Justice, "Notice of Proposed Rulemaking" (draft), Jan. 27, 1982, §41.155. For the importance of establishing and enforcing agency adherence to such time limits, see Implementation Plan Comments, p. 3.

84/ See 48 Fed. Reg. 3570 (1983) (to be codified at 28 C.F.R. Part 42 and 29 C.F.R. Part 1691). Developed in cooperation with EEOC, this regulation establishes procedures whereby Federal assistance agencies may refer certain employment discrimination complaints for EEOC processing. For its potential contribution to reducing duplication, inconsistency, and undue burdens on recipients of Federal assistance, see Louis Nunez, Staff Director, U.S. Commission on Civil Rights, letter to J. Clay Smith, Jr., Acting Chairman, EEOC, June 11, 1981.

order, for example, requires the Division to establish standards for case referrals. 85/ Properly designed, these would deter agencies from unduly prolonging negotiations and ensure the cases they referred were appropriate for litigation. 86/

The order also requires the Division to establish procedures for cooperative arrangements with State and local enforcement agencies. 87/ As experience in fair housing indicates, these are needed to ensure such arrangements do not impair enforcement of Federal civil rights laws. 88/ The

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85/ Exec. Order No. 12,250, §1-204.

86/ For the importance of referral standards, see Exec. Order No. 12,250 Comments; Implementation Plan Comments, p. 3.

87/ Exec. Order No. 12,250, §1-206.

88/ See U.S., Commission on Civil Rights: The Federal Civil Rights Enforcement Effort--1974, vol. II, To Provide for Fair Housing (1974), pp. 43-45 and The Federal Fair Housing Enforcement Effort (1979), p. 33. See also chapter 4 of this report. Some major Federal assistance agencies have plans to initiate cooperative agreements with State agencies. U.S., Department of Education, Office for Civil Rights, "Annual Operating Plan for Fiscal Year 1984," 48 Fed. Reg. 34094, 34096 (1983) (proposed July 27, 1983); Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letters to Kathryn Baer, civil rights analyst, U.S. Commission on Civil Rights, Mar. 31, 1983 and Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 23, 1983, enclosure, p. 4. Marcella Haynes, Chief, Special Projects Branch, Office for Civil Rights, Department of Health and Human Services, telephone interview, Sept. 2, 1983. Their interest in this area underscores the need for adequate standards and oversight.

Division has lacked staff to develop these as well as required referral standards and has no plans to work on them in FY 84. 89/

The Division also must evaluate the actual civil rights enforcement performance of Federal assistance agencies and recommend needed improvements. 90/ This task would be mosteffectively accomplished by combining reviews of the plans agencies must submit with more intensive onsite audits. 91/ The coordination and review section, however, has had to rely on "desk audits" of agency plans, 92/ which may not reflect all deficiencies or needs for training and technical assistance. 93/ The section has evaluated agency resources

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89/ FY 83 Budget Report, pp. 38-39; Oneglia Interview. Changing policies, as well as lack of staff could be a factor delaying development of referral standards. For changed Division policies on referred cases, see discussion of standards for litigation under Title VIII above.

90/ Exec. Order No. 12,250, §1-302.

91/ Implementation Plan Comments, p. 6.

92/ Oneglia Interview. The Division reports that, under a policy adopted in 1982, program monitors spend more time in the agencies than formerly. Reynolds October Letter, p. 13; Sullivan Oct. 26 Interview. Requested clarification of their activities and the relation of this initiative to onsite audits conducted under former Title VI coordination procedures was not received in time for inclusion in this report.

93/ FY 83 Budget Report, p. 39. The Division believes that negotiations while plans were under development and an established "network" enable the section to identify technical assistance needs. Reynolds October Letter, pp. 13-14. It also notes the section has reviewed 3 major agencies' civil rights training programs and plans to review others shortly. Ibid., p. 14.

through such audits. 94/ It, however, has no systematic procedure for monitoring agency information needs so that it could raise concerns with the Office of Management and Budget if such needs were being denied by inadequate funding or pressures to reduce paperwork. 95/ The section instead

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94/ Oneglia Interview. Agencies are required to provide the section copies of their annual reports submitted under OMB Circular No. A-11-53 (last year submitted under OMB Circular No. A-11-13.2). U.S., Department of Justice, Civil Rights Division, Coordination and Review Section, "Guideline for Agency Implementation Plans Required by Executive Order 12250, 'Leadership and Coordination of Nondiscrimination Laws,'" undated (sent to agencies Dec. 4, 1981), p. 12. These reports indicate what activities agencies' civil rights enforcement budgets have supported and what activities would be supported by the budgets they have proposed under Office of Management and Budget (OMB) spending guidelines. For an example, see Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letter to Marialice Williams Daniels, Acting Assistant Director for Civil Rights, OMB, Nov. 12, 1982, enclosure. The coordination section in the past was responsible for reviewing Federal assistance agencies' A-11-53 reports and making budget recommendations to OMB. U.S. Commission on Civil Rights' staff notes on OMB workshop, Aug. 24, 1981 (maintained in Commission files). OMB this year indicated no interest in the section's assessments. Oneglia Interview. It is unclear, therefore, whether this activity will continue. For the importance of coordination agency involvement in the budget development process, see To Extend Federal Financial Assistance, pp. 713-24.

95/ Oneglia Interview. For concerns that recent budget cuts and OMB reviews under the Paperwork Reduction Act could deny agencies information needed to enforce civil rights effectively, see Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement before the Subcommittee on Census and Population of the House Committee on the Post Office and Civil Service, Mar. 16, 1982; John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letters to Nathaniel Scurry, Chief, Reports Management Branch, Office of Information and Regulatory Affairs, OMB, Oct. 22, 1982 and Jim J. Tozzi, Deputy Administrator, Office of Information and Regulatory Affairs, OMB, Dec. 2, 1982.

will rely on agencies to call such data collection problems to its attention. 96/

Without more staff, other coordination functions also will remain limited and somewhat reactive. The Executive order, for example, requires Justice to initiate cooperative programs among agencies, in part by developing model agreements they could adopt. 97/ The coordination section has developed 1 such model that could minimize duplicative investigations and allow agencies to target their enforcement resources more effectively. 98/ The section, however, does not plan systematically to identify areas where it would be appropriate and act if agreements are not under discussion. 99/

In FY 84, as in late FY 83, the coordination section will focus on regulations all Federal agencies must issue to carry out their responsibility for ensuring against handicap

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96/ Oneglia Interview.

97/ Exec. Order No. 12,250, §1-207.

98/ The model agreement provides for 1 agency or more to delegate certain enforcement responsibilities to a "lead" agency. There are such agreements already in effect. The model, however, might stimulate more and would provide a basis for updating existing agreements. Ted Nickens, Deputy Chief for Compliance, Coordination and Review Section, interview, Mar. 4, 1983.

99/ Ibid. As in the past, however, the section will at times suggest activities appropriate for delegation. Ibid.; Reynolds October Letter, p. 14.

discrimination in the programs they conduct. 100/ While such regulations are long overdue, 101/ this effort is unlikely to result in highly effective enforcement because the Division is tacitly encouraging agencies to narrow the scope of Federal civil rights protections and limit affirmative obligations to provide equal opportunity. 102/ Although the Division believes Congress intended to establish the same nondiscrimination obligations for the Federal government as for recipient of

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100/ Oneglia Interview.

101/ Section 504 was amended in 1978 to cover federally-conducted as well as federally-assisted programs. 29 U.S.C. §794 (Supp. V 1981). According to the Division, "only a handful" of the approximately 90 agencies responsible for issuing regulations under the 1978 amendments have done so. Reynolds DAV Speech. The Division has sent agencies a prototype regulation they may adopt with only minor additions and adjustments. Ibid. It expects them to issue regulations similar to the prototype. Reynolds October Letter, p. 12.

102/ For major deficiencies in the prototype and in the procedure of issuing it without notice or opportunity for public comment see, John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, letter to William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Aug. 15, 1983 (hereafter cited as Section 504 Prototype Comments). The Division earlier circulated to affected agencies and other interested parties draft section 504 coordination regulations for federally-conducted programs. William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to Lawrence B. Glick, Solicitor, U.S. Commission on Civil Rights, Mar. 26, 1982 (hereafter cited as Reynolds May Letter), enclosed "Notice of Proposed Rulemaking: Coordination of Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs;" Reynolds October Letter, p. 12. These, however, paralleled the draft section 504 regulations for federally-assisted programs that subsequently were withdrawn. Reynolds May Letter. Comments on them, therefore, should not be regarded as a substitute for comments on the prototype, especially because the general public had no opportunity for involvement.

Federal funds, 103/ use of its prototype would result in lower standards for Federal agencies than for the programs they assist. 104/ In coordination, therefore, as in other areas, both additional resources and changed policies would be necessary for the Division fully to carry out its crucial civil rights responsibilities.

103/ William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, letter to Clarence M. Pendleton Jr., Chairman, U.S. Commission on Civil Rights, Apr. 15, 1983.

104/ Section 504 Prototype Comments. The Division objects to this assessment of the prototype because it believes deviations from section 504 guidelines for federally-assisted programs are justified by court rulings since those guidelines were published. It also suggests there is no inconsistency between standards because section 504 regulations for federally-assisted programs also will be enforced according to those rulings. Reynolds October Letter, pp. 12-13. The Commission believes the Division has adopted unnecessarily restrictive interpretations of the rulings and that other discrepancies cannot be accounted for by developments in case law. Section 504 Prototype Comments.

CONCLUSION

For over 2 years, the Commission has reported that actual and proposed budgets for Federal civil rights enforcement were inadequate to alleviate longstanding problems. 1/ This latest review of selected agencies' performance and plans indicates real progress in some areas reflecting changed leadership commitments, management operations, and caseload demands. Progress based on such factors, however, obviously has limits. In view of these and growing problems in other areas, the Commission believes its earlier conclusions also apply to the proposed FY 84 budget. 2/

1/ See generally U.S., Commission on Civil Rights: Civil Rights: A National, Not A Special Interest (1981) (hereafter cited as FY 82 Budget Statement) and The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982) (hereafter cited as FY 83 Budget Report).

2/ In responding to earlier drafts of chapters in this report, several agencies objected to the conclusion they needed more resources for specific activities, suggesting that increased efficiencies or revised assessments of these activities invalidated their previous higher estimates of resource requirements. Harry M. Singleton, Assistant Secretary for Civil Rights, Department of Education, letter to Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Sept. 23, 1983, p. 4; Betty Lou Dotson, Director, Office for Civil Rights, Department of Health and Human Services, letter to Linda Chavez, Oct. 7, 1983, p. 1; William Bradford Reynolds III, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to Linda Chavez, Oct. 11, 1983, p. ii (hereafter cited as Reynolds October Letter). Other agencies raised more general objections to the implication they should receive more resources. Antonio Monroig, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, letter to Linda Chavez, Sept. 19, 1983, p. 2 (hereafter cited as Monroig Letter); John Seal Management Director, Equal Employment Opportunity Commission, letter to Linda Chavez, Sept. 13, 1983, p. 1. The Commission believes that limits in major enforcement activities under current and proposed resource levels support its conclusion that budgets for the selected agencies are inadequate.

Questions about the reliability of available data preclude detailed assessment of total Federal civil rights enforcement spending. 3/ Proposed and actual FY 83 appropriations for the 6 agencies reviewed, however, offer some perspective on the totals. According to OMB, the administration expected $607.3 million to be spent for Federal civil rights enforcement in FY 83, $43.1 million more than in FY 82. 4/ This figure, however, does not necessarily indicate a similar increase in budget proposals submitted to Congress. 5/ Under the proposed FY 83 budget, the 6 agencies reviewed for this report would have received appropriations totaling only $3.1 million more. 6/ It thus seems clear the reported increase did not

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3/ See discussion of published data on civil rights enforcement spending, chapter 1, and correspondence with the Office of Management and Budget (hereafter OMB) appended to this report.

4/ Executive Office of the President, OMB, Major Themes and Additional Budget Details Fiscal Year 1984, undated, p. 127 (hereafter cited as Major Themes). This figure includes spending by the U.S. Postal Service and the legislative branch, as well as Executive branch agencies.

5/ The OMB figure represents projected outlays, not appropriations requested in the administration's budget. Outlays are what agencies actually spend. They can be higher than appropriations because agencies may have funds left over from a previous appropriation, receive payments due, or otherwise obtain more funds than Congress allocates to them in any given year. Thus, for example, the FY 83 increase in total outlays projected for the agencies reviewed in this report was well over 5 times greater than the total increase in appropriations requested for them. OMB did not publish the administration's total FY 83 appropriations requests for civil rights enforcement activities.

6/ Only 5 of the agencies would have shared in this increase. The administration proposed a reduction in the budget for the Education Department's Office for Civil Rights (hereafter OCR).

represent plans for substantially enhanced support for agencies with major responsibilities for protecting the public from illegal discrimination.

As table 13 shows, Congress adopted most of the administration's proposals, but provided 1 larger increase than requested. The sum of its decisions increased total appropriations for the 6 agencies reviewed by $8.4 million over FY 82. 7/ With this increase, the agencies reviewed had a total of approximately $17.1 million (5.6 percent) more in FY 83 than in FY 80. 8/

Inflation must be accounted for in assessing this increase, however. While no formula has been developed to measure the particular effects of inflation on Federal civil rights enforcement budgets, Congressional Budget Office Gross National Product deflators can give a general sense of trends in agencies' actual spending power. 9/ Using the appropriate deflator to adjust for inflation, 4 of the 6 agencies reviewed

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7/ This figure is so much higher than the administration's proposed budget for the agencies principally because the administration subsequently requested and Congress granted supplemental appropriations for built-in increases such as salaries.

8/ Not all 6 agencies shared in this increase, however. In FY 83, the Education Department's OCR had $9.1 million less than the estimated resources used for civil rights enforcement in education during most of FY 80. U.S., Department of Education, OCR, "Salaries and Expenses, 11 Year History of OCR Appropriations," undated.

9/ For discussion of the use and limits of these formulas, see chapter 1.

Table 13

Changes in Federal Civil Rights Enforcement Spending In Selected Agencies

1982 - 1983

(in thousands of dollars)

Department/Agency	FY 82 (Actual)	FY 83 (Proposed) a/	FY 83 (Actual)
Education/OCR	$ 45,038	$ 44,868	$ 44,868
Health and Human Services/OCR	19,716	21,513	21,513
Housing and Urban Development/FHEO	27,304	27,832	28,962
Labor/OFCCP	43,150	42,614	43,815 b/
Equal Employment Opportunity Commission	144,739	144,937	147,421 b/
Justice/CRD	17,499	18,822	19,233 b/
TOTAL	297,446	300,586	305,812

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a/ Figures represent appropriations originally proposed to Congress.

b/ Figure includes requested supplemental appropriations granted by Congress.

SOURCES: For FY 82 and FY 83 actual appropriations see tables 1, 3, 5, 7, 9, and 11. For FY 83 proposed and supplemental appropriations see U.S., Department of Education, Office for Civil Rights, "Salaries and Expenses," undated p. 299; U.S., Department of Health and Human Services, "Justifications of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1983, Departmental Management, Office for Civil Rights," undated, p. 108; U.S., Department of Housing and Urban Development, Congressional Justification for 1983 Estimates (March 1982), pp. P-1, Q-1; Ellen Shong, Director, Office of Federal Contract Compliance Programs, Department of Labor, letter to John Hope III, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 25, 1983; David A. Rutherford, program analyst, Division of Program Analysis, Office of Federal Contract Compliance Programs, telephone interview, Oct. 26, 1983; Equal Employment Oportunity Commission, 1983 Budget Submitted to the Congress of the United States (1982), p. 3; U.S., Department of Justice, Civil Rights Division, "Salaries and Expenses, General Legal Activities," undated, p. 164; and James Sullivan, legislative counsel, Civil Rights Division, telephone interview, Oct. 23, 1983.

would appear to have incurred losses totalling over $42 million (more than 16 percent) of their actual spending power for enforcement since FY 80. 10/

Staffing levels may be a clearer measure than appropriations of budgetary support for Federal civil rights enforcement because staff are such a vital resource. In FY 83, 5 of the 6 agencies reviewed lost authorized positions, 11/ and all had fewer authorized positions than in former years. Since FY 80, in fact, their total authorized strength had declined more than 21 percent. The OCRs in the Departments of Education and Health and Human Services, moreover, had lost funds formerly used to supplement staff with contract personnel. According to OMB, the administration expects $632.2

10/ These agencies were the OCRs in the Departments of Education and Health and Human Services, the Labor Department's Office of Federal Contract Compliance Programs (hereafter OFCCP), and the Equal Employment Opportunity Commission (hereafter EEOC). Compared to FY 80, the Justice Department's Civil Rights Division had approximately 3 percent more spending power and the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity (hereafter FHEO) approximately 6 percent more. The latter, however, had lost spending power since FY 81. Commission staff derived these estimates by dividing the agencies' appropriations by a factor that accounts for annual inflation rates since FY 80. Deflators for each fiscal year through FY 84 were provided by Steven Zeller, economist, Fiscal Analysis Division, Congressional Budget Office, telephone interview, June 30, 1983.

11/ Only the Department of Health and Human Services' OCR had as many authorized positions as in FY 82. The others had a total of 263 fewer positions in FY 83 than in FY 82.

million to be spent for Federal civil rights enforcement in FY 84. 12/ The proposed budget included a $2.8 million decrease for the Education Department's OCR, a smaller decrease for FHEO, 13/ and increases totalling $13.7 million for the other 4 agencies reviewed. With rough adjustments for inflation, however, only the Justice Department's Civil Rights Division would receive an increase large enough to offset recent losses in actual spending power due to inflation. 14/ Even this increase, moreover, would fall far short of restoring positions lost since FY 80. 15/ Including the Division's slight gain, the proposed FY 84 budget for the 6 agencies reviewed would represent a loss possibly approaching $43 million in actual spending power since FY 80. 16/ Though most of the agencies would have more funds than in FY 83, their total authorized

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12/ Major Themes, p. 127. This is an outlay figure based on the adoption of the administration's proposed budget, not the total of requested appropriations in the budget. As in previous years, OMB did not publish total requested appropriations.

13/ FHEO, which received a higher FY 83 appropriation than the administration recommended, would lose $287,000 under the proposed FY 84 budget.

14/ When the Division's proposed appropriation is adjusted using the Congressional Budget Office formula, it would have approximately $1.4 million more in actual spending power under the proposed budget than it had in FY 80.

15/ Of the 52 positions the Division has lost since FY 80, 15 would be restored.

16/ This estimate, like others in this report, is based on a Congressional Budget Office formula developed for the national economy and, therefore, should not be taken as an exact figure.

staffing strength would remain unchanged. 17/

Civil rights enforcement problems cannot be resolved simply by increasing funding. 18/ Without commitments to strong Federal leadership and efficient management, additional funds may leave such problems untouched. Similarly, declining resources do not necessarily mean such problems will grow worse. That is why it is necessary to look beyond budget figures to the activities they support, review them against outstanding needs, and, on this basis, assess the adequacy of proposed resources. Such assessments must be tentative. Available performance indicators often do not yield sufficient information on effectiveness, and data on the extent of discrimination problems are very incomplete. 19/ Current demands, moreover, do not always predict future workloads accurately. 20/ Factors less directly related to resource

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17/ The Health and Human Service Department's OCR would lose 15 positions, the same number the Civil Rights Division would gain.

18/ FY 82 Budget Statement, p. 47; Clarence Pendleton, Jr., "Statement Releasing The Federal Civil Rights Enforcement Budget: Fiscal Year 1983," May 27, 1982, p.4.

19/ Inadequacies in these data limit civil rights enforcement, as well as budget and performance assessments, because agencies cannot effectively target compliance reviews, technical assistance, and other types of interventions they initiate without a clear overall picture of compliance problems. For concerns about resource and policy limits on civil rights data collections, see chapters 2, 3, 5 and 7. For the need to monitor this area systematically, see chapter 7.

20/ In several of the reviewed agencies, for example, complaints dropped off sharply after rising for a number of years. Their workload projections, therefore, proved inaccurate.

demands also may affect performance significantly. Policies pursued by the Justice Department, for example, establish key civil rights enforcement trends that shape other agencies' activities and their results.

General conclusions about Federal civil rights performance and plans also are difficult to make because agencies' responses to budgetary constraints differ according to their established obligations, procedures, actual and expected workloads, and other important factors, including leadership. Such conclusions, therefore, cannot apply equally and in the same manner to every agency reviewed. They, nevertheless, may provide a useful overview of the adequacy and uses of Federal civil rights enforcement resources.

All agencies report efforts to increase efficiency, such as streamlined procedures, enhanced staff responsibilities, stricter performance standards, and reorganizations to eliminate overlapping functions. Since these generally still are in the planning stages or barely under way, their results cannot yet be assessed. 21/ Some, however, hold out the prospect of concentrating resources more effectively. 22/

21/ Preliminary evaluations also were hampered by inadequate information. See, for example, discussions of expedited complaint resolution procedures adopted by the OCRs in the Departments of Education and Health and Human Services, chapters 2 and 3. Information needed to assess the qualitative results of new approaches also was lacking.

22/ For an example of a promising initiative, see the government-wide complaint referral rule developed by the Justice Department and EEOC, cited in chapters 6 and 7 of this report.

Others seem unrealistic or suggest that levels of activity may be increased at the expense of thoroughness. 23/

However warranted, increased efficiency seems unlikely to compensate adequately for declining resources. Recent performance and plans of the agencies reviewed indicate persistent and, in some areas, growing problems. Improvements set in motion have been limited and could be reversed under the proposed FY 84 budget and the priorities it reflects.

Preoccupation with individual discrimination complaints, for example, has been a longstanding problem. Faced with large backlogs of accumulated old complaints and mounting volumes of new complaints, agencies often have been unable to meet complainants' needs for prompt relief or commit enough resources to more effective activities, such as efforts to eliminate widespread patterns and practices of discrimination. Declining complaint receipts have helped alleviate this problem in some agencies, including the OCRs in the Departments of Education and Health and Human Services and OFCCP. 24/ Increasing caseloads and diminished resources in others,

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23/ For questions about the feasibility of projected increases in activity, see discussion of FHEO plans for complaint investigations and compliance reviews, chapter 4. For compromises in thoroughness to increase activity, see discussions of scaled back reviews by the Health and Human Services Department's OCR, diminished results of OFCCP compliance reviews, and adverse effects of expedited complaints processing on EEOC litigation, chapters 3, 5, and 6.

24/ Agency staff and members of civil rights organizations have various theories about this decline. Further research would be required to develop a reliable explanation, however.

however, have hindered recent efforts to resolve it. 25/

Such problems would be aggravated under the proposed FY 84 budget not only by inadequate staffing, but also by reduced funding for State and local enforcement agencies to participate in Federal complaints processing as Congress intended. 26/ Plans to encourage greater State agency involvement in other areas already have been scaled back or delayed by lack of funds. Despite the consistency of such plans with current administration policies and the importance of State agency compliance activities, the proposed FY 84 budget would provide no additional funds to support them.

Compliance reviews to correct widespread serious discrimination problems have increased in some areas as staff losses have been offset by declining complaint receipts and, perhaps, management improvements. The Education Department's

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25/ See, for example, discussions of persistent problems in FHEO complaints processing and EEOC efforts to eliminate its backlog of complaints received before 1979, chapters 4 and 6.

26/ Title VII of the Civil Rights Act of 1964, provides for deferrals of Federal action on employment complaints to afford State and local agencies the time to remedy the discrimination under State and local laws. 42 U.S.C. §§2000e-5(c), (d) (1976 & Supp. V 1981). The statute also provides for Federal funding of State and local agencies to enable them to assist with enforcement of Federal law. 42 U.S.C. §2000e-8(b) (1976). Title VIII of the Civil Rights Act of 1968 contains similar provisions for housing discrimination complaints. 42 U.S.C. §§3610(c), 3616 (1976). For problems resulting from reduced funding for such agencies and lack of Federal staff to oversee them, see chapters 4 and 6. Congress also has assigned States a role in resolving complaints of discrimination in most health and human services block grants. Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §§300w-7, 300y-9, 708, 8625, 9906 (Supp. V 1981). For delays in implementing the block grant requirements, see chapter 3.

OCR, for example, began 50 percent more reviews in FY 82 than in FY 81 and probably maintained if not exceeded this enhanced level in FY 83. 27/ In other critical areas, however, investigations of discriminatory patterns and practices have declined. In some, they have become virtually negligible. For example, in FY 82, despite evidence of widespread housing discrimination, FHEO reviewed just 2 percent of the projects whose civil rights compliance it must oversee. In the first half of FY 83, it began reviews of fewer than 0.7 percent. Some agencies that have increased reviews, moreover, are achieving less corrective action than in the past. 28/ Other types of reviews, such as preaward reviews to prevent Federal funds from flowing to discriminatory activities, also have been reduced.

Such effective activities would remain limited and perhaps decline under the proposed FY 84 budget, leaving large-scale discrimination problems unresolved and shifting the enforcement burden to victims of discrimination who can ill-afford private

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27/ This increased effort, however, still covered only 8 percent of the institutions the agency had good reason to believe should be investigated for serious violations of major civil rights requirements.

28/ See discussion of reduced OFCCP conciliation agreements and financial settlements, chapter 5. See also discussion of limited remedies achievable through narrowed reviews initiated by the Health and Human Services Department's OCR, chapter 3.

suits to secure their rights. 29/ To this extent, the proposed budget would fail to support basic objectives of Federal civil rights laws.

Technical assistance to encourage voluntary civil rights compliance has been limited as well. Some substantial efforts to clarify compliance obligations and inform protected individuals of their rights, in fact, have been virtually decimated by budget cuts during the last several years. 30/ Although 3 agencies discussed here report plans to increase technical assistance in FY 84 and a fourth promises a "sizable" program, they would receive no additional resources for this purpose. They, thus, could not launch vigorous programs to improve awareness of civil rights requirements without further limiting other activities they must conduct to fulfill their statutory enforcement obligations.

Finally, activities to eliminate inconsistency and duplication in Federal civil rights enforcement have been severely restricted. FHEO has taken no action to carry out its coordination responsibilities. Other coordination agencies have had to scale back or postpone initiatives at least in part

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29/ For particular concerns about the burden borne by private parties due to inadequate Federal government efforts, see discussions of changed enforcement policies by the Health and Human Service Department's OCR and voting rights enforcement by the Civil Rights Division, chapters 3 and 7. See also discussion of limited litigation by EEOC, chapter 6.

30/ See discussion of technical assistance provided by OCR in the Department of Health, Education, and Welfare and subsequently in the Department of Education, chapter 2.

because staff were available for only a few pressing tasks. As a result, standardized investigation tools, recordkeeping requirements, information sharing systems, and other procedures to ensure enforcement resources are used efficiently and without imposing undue burdens have not been developed. 31/ Under FY 84 coordination plans, many such procedures still would be lacking.

Budget restrictions are not the only factor limiting effective civil rights enforcement. Coordination, for example, also has been undermined by Civil Rights Division efforts to reduce compliance requirements in establishing consistent enforcement of section 504 prohibitions against handicap discrimination. Indeed, the Commission believes a wide range of Federal civil rights enforcement efforts have been jeopardized at least as much by Division policies as by recent resource constraints. Although the Division has shown strong commitments in some areas, such as criminal civil rights prosecutions, in others it has sought to restrict both the scope of Federal civil rights protections and required remedies for discrimination. In choosing to adopt narrow interpretations of Federal civil rights authority rather than seeking to confirm broad authority, it has reversed enforcement

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31/ For delays in plans to develop such procedures and other limited leadership activities, see discussions of coordination by the Health and Human Services Department's OCR, EEOC, and the Justice Department's Civil Rights Division, chapters 3, 6, and 7.

policies pursued for nearly a quarter of a century by Republican and Democratic administrations alike.

Because enforcement efforts have narrowed through such complex interactions of resource shortages and policy preferences, increased budgets alone will not achieve the objectives of Federal civil rights laws. Major agencies' recent performance and plans, however, indicate the administration and Congress carefully should consider the need for increases on a case-by-case basis. Through analysis of particular agency obligations and indicators of agency capabilities to fulfill them, resources can be appropriately adjusted and targeted to improve civil rights enforcement. An outcome of such analysis is exemplified by the larger FY 84 budget Congress has adopted for the Education Department's OCR. 32/

Several agencies reviewed for this report suggested their resource levels were justified because other priorities compete with civil rights enforcement and cost-cutting has been greater in some other areas, a view also advanced by OMB. 33/ The

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32/ Rather than cutting this agency's budget, as proposed, the House and Senate have agreed on an FY 84 appropriations bill that would provide a $4.5 million increase. H.R. Rep. No. 422, 98th Cong., 1st Sess., 129 Cong. Rec. H8466 and S14310 (daily ed. Oct. 20, 1983). For evidence of the detailed consideration of obligations and activities leading to this increased support, see S. Rep. No. 247, 98th Cong., 1st Sess. (1983).

33/ Monroig Letter, p. 2; Reynolds October Letter, p. 1; Michael J. Horowitz, Counsel to the Director, OMB, letters to Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, June 25, 1982, p. 2, and Aug 27, 1982, pp. 1-2.

Commission, however, believes civil rights enforcement is a unique Federal obligation grounded in a history of discrimination and established constitutional and statutory commitments to overcome it. Therefore, while the Commission recognizes the need to control Federal spending, it does not believe budgets to carry out these commitments should be controlled by economies imposed in other areas. 34/ The better measure is whether such budgets adequately support strong efforts against persistent discrimination.

Deficient Federal civil rights enforcement is not a new problem. It grows more urgent, however, as vital promises of equal opportunity remain unfulfilled, shaking faith in this Nation's guarantees of liberty and justice for all.

34/ FY 82 Budget Statement, pp. iii-iv, 123.

STATEMENT OF CLARENCE M. PENDLETON, JR. ON FEDERAL CIVIL RIGHTS COMMITMENTS: AN ASSESSMENT OF ENFORCEMENT RESOURCES AND PERFORMANCE.

It is important to state for the record that this report has only been prepared and published in this format since President Reagan took office. All comparisons in this report are based on a benchmark of 1980. 1980 was a very unusual year. It was an election year, and we all know that election years produce higher than usual budgets. It was also a year that America suffered an extremely high inflation rate, more than 12%. To compare 1983 budget allocations with those of 1980 is faulty no matter what deflators are used to offset the differences.

My basic criticism of this report is that it will be interpreted by some as an audit of federal expenditures for civil rights enforcement. It is not an audit and even the staff at the Commission is honest enough to admit that they are unable to perform an audit. The limitations preventing such an audit are a lack of staff capability, resources and time.

Considerable time has been spent by staff analyzing what they believe will happen and measuring disparities in staffing patterns and line item budget dollar amounts; but, --and I stress this point--no sustained research has been undertaken, certainly no rigorous empirical testing, to justify the original assumption.

The introduction states that cut backs cannot be offset by improved management techniques, cost effective investigations and better coordination. How can this judgement be made without performing a cost benefit analysis? It is my firm belief that enforcement effectiveness can only be measured by an analysis of results.

No mention is made of the fact that of the six agencies studied, all except one are headed by Reagan appointees who are members of protected classes. If the situation were truly untenable would they lie? The report leads the reader to believe they might. I find this truly objectionable. I believe the men and women who head these agency civil rights divisions would scream loud and often if they were forced by this President or any member of his administration to ignore civil rights abuses and curtail enforcement.

In fact, the only hard data in the report, the number of complaints, investigations, compliance reviews, litigation, etc. prepared by each of the six agencies studied, is relegated to footnotes and letters in the appendix. The body of the report contains little or no empirical data. It is filled with the notion of some vague standard about what could be achieved with unlimited resources.

Finally, I would like to propose that this agency find the resources for designating a model that would fairly audit civil rights enforcement effectiveness, policies and programs. Are this President's policies and programs tantamount to a rollback in civil rights enforcement? If an audit determines that there is a rollback in civil rights enforcement, I would not hesitate to challenge this administration to change its programs and policies. However, I am unwilling to do this without hard data to support this charge.

STATEMENT OF MARY FRANCES BERRY, BLANDINA CARDENAS RAMIREZ, JILL S. RUCKELSHAUS, AND MARY LOUISE SMITH ON FEDERAL CIVIL RIGHTS COMMITMENTS: AN ASSESSMENT OF ENFORCEMENT RESOURCES AND PERFORMANCE

As this report indicates, the Commission has evaluated and publicly commented on Federal civil rights enforcement budgets for many years. The Commission's interest in determining whether Federal civil rights enforcement resources are adequate and properly used is longstanding. The form of its assessments has varied but not their purpose. We believe the Commission's independent analyses are important because they can address enforcement needs without compromises for competing priorities.

Similarly, the report follows past Commission practice in evaluating enforcement performance and budgets without regard to personal characteristics of agency heads. As in the past, our evaluation is in no way dependent on such factors.

We believe the report is a balanced, thoroughly professional study conducted according to established research procedures and careful reviews for accuracy. Its conclusions amply are supported by the data presented. The staff have shown their usual conscientiousness in analyzing, and including where appropriate, the views of the affected agencies.

APPENDIX A

In June 1982, the Commission issued The Federal Civil Rights Enforcement Budget: Fiscal Year 1983, an evaluation of proposed FY 83 appropriations for Federal civil rights enforcement. The Office of Management and Budget (OMB) objected to the Commission's conclusions, particularly those regarding total enforcement spending. This renewed an earlier exchange regarding the reliability and appropriate interpretation of OMB civil rights budget data. The continuing correspondence initiated by the Commission's 1982 report is reproduced here.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 25, 1982

Honorable Clarence Pendleton, Jr.
Chairman, U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington D.C. 20405

Dear Mr. Pendleton:

The media, in reporting on the Commission's Report entitled "Federal Civil Rights Enforcement Budget: Fiscal Year 1983" ["the Report"] have noted your doubts about the conclusion that the Report demonstrates a lack of Administration commitment to civil rights enforcement. Your doubts were fully warranted. I am troubled that OMB, as the President's budget agent, was not afforded the opportunity to review and respond to the Report prior to its issuance. Had OMB been given such an opportunity, which I understand has been extended in the case of prior Commission reports, I believe that many of your doubts would have been confirmed.

First, the Report's central assertion that total Federal expenditures on civil rights activities have fallen since FY 1980 is flatly incorrect. The Special Analysis "J" figure for FY 1980, on which the Report was apparently based, includes spending for non-civil rights activities that, in the interest of accurate reporting, the Administration excluded from the FY 1981- 1983 totals. For example, the Administration eliminated the past practice of reporting all agency "upward mobility" expenditures (most of which were employee development expenses) as civil rights expenditures. Deleting those expenditures from the total for FY 1980, as they were excluded from the totals for FY 1981-1983, shows that civil rights expenditures as reported by agencies have actually increased:

FY 1980	$511 million
FY 1981	$520.7 million
FY 1982	$522.5 million
FY 1983	$531.4 million

Moreover, decreases in reported civil rights expenditures were largely limited to agencies with only "internal EEO" responsibilities. Resource figures for internal EEO are inherently "soft", because most internal EEO programs, unlike most external enforcement programs, are not line items in agency budgets, and because many personnel perform EEO functions in addition to other duties (e.g., personnel). Internal EEO data, therefore, are enormously susceptibile to inflation in given years by agency managers, thereby making the overall resource figures used in the Report inherently unreliable. For example, internal EEO estimates were largely responsible for the suspiciously large increase in civil rights expenditures reported between FY 1979 and 1980, from $464 million to $553 million, an increase of 19% that was reported during an election year.

Second, the Report's analysis is frequently selective, incomplete, and misleading. The statement that civil rights expenditures declined from .09% to .07% from FY 1978 through the President's proposed budget is a prime example. Federal outlays are driven by factors such as entitlements, interest on debt, and national security needs that make it impossible to guarantee quota allocations for civil rights or any other spending programs whose levels are not fixed by law. Simply put, while total outlays over that period were increased by $309.3 billion, that figure was exceeded by increase in payments to individuals (Social Security and other entitlement programs) ($159.3 billion), interest payment increases ($61 billion), and national defense increases ($115.9 billion). All other spending declined from $101.3 billion in 1978, or 22.5% of total outlays, to $74.3 billion, or 9.8% of projected 1983 outlays. Indeed, due to the rapid increase in spending on entitlements and interest, such expenditures declines equally sharply as a percentage of domestic spending along (excluding defense): from 29% of total FY 1978 domestic outlays to 13% of such outlays in FY 1983.

Thus, in comparison with discretionary programs as a whole, civil rights programs have clearly been favored. In fact, it is apparent that this Administration has accorded a higher priority to civil rights activities:

Civil Rights Expenditures As a Percentage of Domestic Spending for Purposes Other Than Entitlements and Interest

FY 1978	.4%
FY 1980	.3%
FY 1983	.5%

I am enclosing a copy of Table 2, Composition of Budget Outlays in Current and Constant (Fiscal Year 1972) Prices: 1962-85 from the FY 83 Budget in Brief, which details these trends. As the following chart indicates, the programs discussed in the Report fared exceedingly well in contrast to all other non-entitlement domestic outlays. This is true even for OFCCP, the only program that was substantially reduced over the FY 80-83 period.

Difference Between 1980 (Actual) Expenditures and Proposed 1983 Expenditures

Program	% Total Dollars
OCR (ED)	-4%
OCR (HHS)	+2%
CRD (DOJ)	+24%
OFCCP (DOL)	-16%
EEOC	+15%

Finally, the Report's basic premise, that Federal expenditures for given social objectives are an index of either progress or commitment, has been discredited for some time and is no more valid for civil rights than any other area of national concern. As the Commission itself has documented (in reports ranging from the multi-volume Federal Civil Rights Enforcement Effort of 1973 through the Report itself), Federal civil rights programs have too often been characterized by absence of goals and planning, poor management, and general inefficiency. Moreover, the problems that the Administration inherited in the agency programs discussed in the Report furnish particularly persuasive evidence that commitment can be more accurately gauged by efforts to improve program effectiveness.

For example, as documented in the General Accounting Office's recent report, "Continuing Financial Management Problems at the Equal Employment Opportunity Commission", the EEOC has no effective system for knowing how much it spends on a day to day basis. GAO noted that the EEOC's financial management problems alone could result in underestimating the availability of funds and "...unnecessary cancellation of programmed activities, slippage of required programs, and even job losses for agency employees".

Indeed, the severity of the problems at the EEOC prompted Senator Hatch to observe that "This Administration and this committee have been criticized for lack of commitment to civil rights, yet the record speaks otherwise... Because we ask critical questions ... and take the studies of GAO seriously, we are accused of being anti-civil rights. I must question whether those who criticize are also the same as those who would allow the conditions which the GAO revealed at EEOC to continue and thereby deny the services to the people who need the assistance for which the agency was created."

The relevance of Senator Hatch's question clearly is not limited to the EEOC. The Report's equation of increased expenditures with increased effectiveness could have the effect, if adopted by this Administration, of exempting the programs discussed by the Report from the management evaluation and improvement now being effected by this Administration throughout the Government. As Senator Hatch forcefully observed, such an approach would be deceptive to the very persons whose rights the programs are meant to secure.

I reemphasize my disappointment that the work of the Commission staff was not made subject to OMB view prior to its public release.

The Commission has the potential to aid in identifying and correcting shortcomings in the Federal government's civil rights efforts. That potential is not likely to be realized, however, by the unreviewed release of data that may neither be correct nor relevant.

I believe that further discussion is in order and look forward to speaking with you on these important matters.

Very truly yours,

Michael Horowitz

Michael J. Horowitz
Counsel to the Director

Table 2. COMPOSITION OF BUDGET OUTLAYS IN CURRENT AND CONSTANT (FISCAL YEAR 1972) PRICES: 1962–85

(In billions of dollars)

Fiscal year	Current prices						Constant (fiscal year 1972) prices					
	Total outlays	National defense	Nondefense				Total outlays	National defense	Nondefense			
			Total nondefense	Payments for individuals	Net interest	All other			Total nondefense	Payments for individuals	Net interest	All other
1962	106.8	49.0	57.8	28.7	6.9	22.2	160.8	77.2	83.6	38.5	9.6	35.4
1963	111.3	50.1	61.2	30.4	7.7	23.1	163.0	76.8	86.2	40.2	10.6	35.4
1964	118.6	51.5	67.1	31.6	8.2	27.3	170.1	77.0	93.1	41.4	11.1	40.9
1965	118.4	47.5	71.0	32.3	8.6	30.1	166.7	69.3	97.5	41.5	11.4	44.5
1966	134.7	54.9	79.8	36.2	9.4	34.2	182.6	76.5	106.1	45.5	12.2	48.4
1967	157.6	68.2	89.4	43.1	10.3	36.0	207.0	92.3	114.7	52.6	12.9	49.1
1968	178.1	78.8	99.4	48.7	11.1	39.6	224.3	101.7	122.6	57.7	13.5	51.4
1969	183.6	79.4	104.2	55.3	12.7	36.3	220.4	98.0	122.4	62.8	14.7	44.8
1970	195.7	78.6	117.1	63.2	14.4	39.6	220.1	90.3	129.8	68.6	15.8	45.4
1971	210.2	75.8	134.4	78.7	14.8	40.9	222.5	81.5	141.0	81.8	15.5	43.7
1972	230.7	76.6	154.1	90.8	15.5	47.9	230.7	76.6	154.1	90.8	15.5	47.9
1973	245.6	74.5	171.1	102.1	17.3	51.6	233.1	69.9	163.2	98.1	16.6	48.5
1974	267.9	77.8	190.1	117.5	21.4	51.2	236.9	68.1	168.8	104.5	19.2	45.1
1975	324.2	85.6	238.7	150.4	23.2	65.1	260.6	68.5	192.1	121.9	18.9	51.3
1976	364.5	89.4	275.0	176.6	26.7	71.7	274.9	67.0	207.9	135.0	20.3	52.5
1977	400.5	97.5	303.0	192.4	29.9	80.8	280.9	67.4	213.4	137.4	21.3	54.8
1978	448.4	105.2	343.2	206.5	35.4	101.3	294.3	67.8	226.5	138.7	23.6	64.2
1979	491.0	117.7	373.3	227.5	42.6	103.2	298.3	70.4	228.0	140.9	26.2	60.9
1980	576.7	135.9	440.8	271.2	52.5	117.2	319.4	73.1	246.3	152.6	29.7	64.0
1981	657.2	159.8	497.4	316.6	68.7	112.1	330.6	76.6	254.0	163.6	35.5	54.9
1982 estimate	725.3	187.5	537.8	351.6	83.0	103.3	338.1	82.6	255.6	168.6	39.6	47.3
1983 estimate	757.6	221.1	536.6	365.8	96.4	74.3	331.3	91.1	240.3	165.2	43.2	31.8
1984 estimate	805.9	253.0	553.0	385.3	98.7	69.0	334.4	98.3	236.1	166.2	42.1	27.9
1985 estimate	868.5	292.1	576.4	409.8	100.8	65.8	342.3	107.5	234.9	168.7	41.1	25.1

Note.—The constant price data for both the payments for individuals and net interest categories are now produced using different deflator series from those used in previous budgets.

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

AUG 1 0 1982

Mr. Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Horowitz:

As you asked in our meeting and your June 25, 1982 letter, I have reviewed your comments on our May report on the Federal civil rights enforcement budget for fiscal year 1983. I am enclosing for your information a detailed memorandum from the Acting Staff Director that I believe addresses those concerns appropriately.

I was delighted to meet with you last month and will be glad to hear from you further on this or any other issue of mutual interest.

Sincerely,

PENNY

CLARENCE M. PENDLETON, JR.
Chairman

Enclosure

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

AUG 10 1982

MEMORANDUM TO CHAIRMAN PENDLETON

FROM: JOHN HOPE III
Acting Staff Director

John Hope III

SUBJECT: Response to Michael Horowitz on Budget Report

Staff has studied the points raised in the letter of June 25, 1982 from Michael Horowitz, Counsel to the Director of the Office of Management and Budget, to you about the Commission's recent report, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983. I hope this clarification of the purpose and scope of the report will be helpful and that we can follow it up with more effective liaison between staff of the Commission and of the Office of Management and of Budget on civil rights budget matters and other issues of mutual concern.

Mr. Horowitz's letter states that the report's brief introductory treatment of overall trends in Federal civil rights enforcement spending is inaccurate because it is based on inflated fiscal year 1980 data published in OMB's Special Analysis J (Civil Rights Activities). More specifically, it notes that the decrease in total civil rights spending shown in the Special Analysis tables reflects OMB's exclusion of expenditures for "upward mobility" programs, not an actual decrease in spending for civil rights activities.

Footnote 10 of our budget report notes that Special Analysis J data have not always been reliable but that we used them because they were the only comprehensive data readily available. We were somewhat surprised to learn that OMB used a new method in the fiscal year 1981 Special Analysis for calculating prospective expenditures without recalculating actual fiscal year 1980 expenditures accordingly. Adjusting our figures to take account of this difference, however, does not alter our conclusion that spending for civil rights enforcement has not kept pace with inflation. Using the totals provided in his letter, we estimate that the proposed fiscal year 1983 budget would represent a loss of about 18 percent in actual spending power for civil rights enforcement since fiscal year 1980, compared to the nearly 25 percent decline we estimated based on OMB's published totals.

The OMB letter argues also that the decreases in civil rights enforcement spending reported in Special Analysis J reflect mainly reductions in reported spending for "internal EEO" programs, rather than external civil rights enforcement. The letter suggests that internal EEO data are especially liable to exaggeration and, thus, to result in exaggerated totals for previous years. It is not clear to us that internal EEO data would skew multi-year trends such as we reported, since any liability to inflation would appear to be a constant factor.

We agree, by the way, that internal EEO activities should not be lumped together with activities to enforce civil rights compliance outside the Federal sector. We have recommended repeatedly that agencies be required to report them separately. Since revised Circular No. A-11-53 reflects this recommendation, we were disappointed that Special Analysis J for fiscal year 1983 did not yield more refined data.

Not knowing what comparisons Mr. Horowitz made, we cannot respond in detail to his statement that decreases were concentrated in agencies with only internal EEO responsibilities. Taken alone, such decreases, however, may be cause for concern because agencies need adequate resources to improve opportunities for minorities and women in the Federal work force. Our 1981 study of equal opportunity in the Foreign Service, for example, suggested that additional resources might be necessary to carry out State Department plans and our recommendations to correct underrepresentation of minority and women Foreign Service officers in middle and top-level positions.

Virtually all the agencies identified in Special Analysis J tables, however, have civil rights responsibilities beyond internal EEO. We are concerned if they are not reporting expenditures to carry them out. Further, as Mr. Horowitz acknowledges, budget cuts have extended to some agencies with major external enforcement responsibilities. Indeed, when inflation is taken into account, all the agencies we studied in detail have lost resources since fiscal year 1980.

His second point about our report is that it presents civil rights enforcement expenditures as a share of the total Federal budget, rather than as a share of the budget for discretionary domestic spending. Our main point, as his own analysis shows, is that civil rights enforcement accounts for a tiny fraction of Federal spending. This point properly is made by comparing civil rights outlays to all other outlays. Further, discretionary domestic programs are not the only budget items that reflect priorities. We believe it would be misleading to place outlays for civil rights enforcement in a context that excluded other major priorities.

Mr. Horowitz's third point is that the Commission equates Federal expenditures, instead of efforts to increase effectiveness, with civil rights progress or commitment. On the contrary, as you made clear in releasing the report, civil rights enforcement problems cannot be corrected simply by "throwing money at them," and we fully appreciate the need to control Federal spending. Further, the agency-by-agency analyses that constitute the bulk of the report focus on the adverse impact of declining resources on effective enforcement activities, including recently authorized coordination activities that can prevent wasteful duplication and inconsistency. They also show that agencies plan further cutbacks in such activities in fiscal year 1983. We, therefore, clearly based our concerns on agencies' performance indicators and program plans, not merely on gross spending levels.

Commission staff remains concerned about management problems in civil rights enforcement and believe that improvements are necessary and possible. We also will continue to explore more cost-effective alternatives for promoting civil rights compliance and hope our conclusions will assist the Administration in improving enforcement programs. As you stated in releasing our report, however, alternative methods "take time to develop . . . and must be carefully evaluated before they are put in place."

In response to Mr. Horowitz's disappointment that this report was not subjected to OMB review before its release, let me note again that the data it presents were drawn from OMB's published budget documents and official agency documents. Where questions arose about the latter sources, we sought confirmation, but we saw no need to question OMB's data. Information in the report was closely checked against sources to ensure accurate citation. In many instances, we ask agencies to review the accuracy of facts (though not interpretations) contained in our reports prior to publication; we have not considered that necessary in our reviews of either the fiscal year 1982 or the fiscal year 1983 budget.

In the past, we have attempted to help OMB improve its civil rights budget documents. I am attaching for your information copies of three letters that demonstrate this effort. OMB did not respond to any of these letters, including our request for comments on our fiscal year 1981 budget analysis. Consequently, we hope that your meeting with Mr. Horowitz will lead to a closer and more effective working relationship with OMB on this and other civil rights issues. For example, we remain ready and willing to work with OMB staff in making the Special Civil Rights Analysis a more useful report. A more systematic liaison effort, including access to agencies' A-11-53 submissions, also would permit us to improve our periodic evaluations of the Federal civil rights budget. There are other areas as well, such as civil rights regulatory activity and review of the Federal sector discrimination complaint process, where a closer working relationship would benefit both agencies and better serve our mutual civil rights goals.

I would like to suggest, therefore, that you ask that Mr. Horowitz designate OMB staff to work with Commission staff for this purpose. His designee should contact Deborah Snow of our staff at 254-6701 to begin this effort.

Attachments

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 27, 1982

Honorable Clarence Pendleton, Jr.
Chairman,
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20405

Dear Clarence:

I appreciate your sending along the Commission staff's response to my letter of June 25. It is highly disappointing, as I hope you will agree.

o My letter emphasized that this Administration has repeatedly increased total outlays for civil rights enforcement: both total civil rights enforcement outlays (from $511 million in FY 1980 to $531 million in FY 1983), and outlays for 3 of the 5 programs discussed in the Federal Civil Rights Enforcement Budget (including proposed increases of 24% for the Department of Justice's Civil Rights Division and 15% for the EEOC over 1980 expenditures). The staff, nevertheless, describes this commitment as "inadequate" because it does not track the rate of inflation (as measured by the GNP deflator). The point borders on the absurd. Approximately 70% of the civil rights outlays addressed by the staff report are for salaries. Thus, the basis of the staff's concern appears to be the rate at which the salaries of Federal civil rights personnel have risen, not the overall adequacy of resources for enforcement. Does the staff really believe that a special COLA should be established for Federal civil rights personnel? Just for these personnel? For all Federal employees? And, how would such a COLA help victims of discrimination?

o My letter emphasized that measurements of "priority" must consider the full context of Federal budgeting, which includes some hard realities: the overriding need to restrain the growth of Federal spending in order to control inflation, while at the same time accommodating enormous increases in legally mandated costs (interest on the national debt and payments to individuals under Social Security and other entitlement programs) and providing for an adequate national defense. The figures we provided emphasized the difficulty of the situation: through FY 1983, increases in those categories alone exceeded the $309 billion increase in the total Federal budget since FY 1978 (with the largest increase, $159.3 billion, for entitlements). We provided figures showing that, as a result, spending for domestic discretionary purposes has steadily declined in the last two Administrations, with a major exception: while the previous Administration allocated a steadily decreasing share of such expenditures to civil rights enforcement, this Administration has proposed to double it (to .6% in FY 1983, from .3% in 1980). This record, I repeat, demonstrates that the Administration has accorded civil rights a high priority indeed—at the necessary expense of other Federal functions that are logical competitors for resources. To this evidence, the Commission staff (aside from its misapplication of the inflation rate discussed above), responds only with a continued insistence that spending for such patently unrelated (and largely uncontrollable) purposes as debt service, entitlements, and national defense are somehow relevant to discerning the degree of priority placed on civil rights enforcement.

o Our point that expenditures are not, in any event, a necessarily valid index of commitment to civil rights concerns has yet to be meaningfully addressed by the Commission's staff. The staff report focuses almost exclusively on activity levels, not the extent to which those activities have been demonstrated to be cost effective in identifying and remedying actual discrimination. The discussion neglects evidence that, in most civil rights programs, improved targeting alone would measurably increase protection against discrimination—frequently at substantially reduced "activity levels." (To cite only the worst examples: the prevalent practice of routinely performing pre and post award compliance reviews, regardless of need; and OFCCP's past practice of blanketing entire industries with reviews).

I am particularly concerned by the staff's failure to meaningfully address the implications of the Comptroller General's recent report on the Equal Employment Opportunity Commission. The report concluded that inept, past management has substantially reduced the EEOC's "spending power". To cite only the most serious examples:

--The EEOC's books could not be audited. As a result, the EEOC had no means for determining how much it had spent and how much of its appropriation continued to be available for spending for enforcement.

--Due to inadequate auditing, the EEOC has failed to recover as much as $15 million in improper expenditures by contractors and grantees.

--The EEOC has forfeited eligibility for hundreds of thousands of dollars in discounts for timely payment of vendors as a result of personnel incompetence.

--The EEOC had failed to recover over $1 million in outstanding travel advances.

These findings, which address only a facet of the serious management problems known to exist at the EEOC, are of particular relevance because they are almost identical to those in a GAO report on the EEOC issued eight years ago, and because the EEOC is widely considered to be one of the better managed Federal civil rights programs.

o The character of both the Commission staff's report and its August 10 response emphasize the need to reiterate my concern that we and other affected agencies were denied the opportunity to comment on the report prior to its release. I find the staff's defense of its procedure ("we ask agencies to review the accuracy of facts but not interpretations") particularly objectionable in the light of commonly accepted principles of auditing and scholarship: comments are sought precisely to assure (as in the GAO's report on the EEOC) that no relevant data have been ignored, and that all plausible interpretations of those data have been considered.

Clearly, the concerns I outlined in my letter of June 25 continue to warrant the Commission's reconsideration of the report and procedures followed in producing it. Such a reconsideration would constitute an appropriate beginning toward the substantial improvements in quality and objectivity which, as you emphasized in your testimony before Senator Hatch, are clearly necessary in the work of the Commission. The stakes are too high to permit the Commission to remain a predictable purveyor of badly researched and often indefensible conventional wisdom.

Very truly yours,

Michael Horowitz

Michael J. Horowitz
Counsel to the Director

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

December 22, 1982

Mr. Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Horowitz:

We are beginning the Commission's annual review of the budgets proposed for Federal agencies with major civil rights enforcement responsibilities. We tentatively plan to evalute the same agencies we have focused on in our last two enforcement budget reports: civil rights enforcement components in the Departments of Education, Health and Human Services, Justice, and Labor and the Equal Employment Opportunity Commission. We also hope to include those units in the Departments of Defense and Housing and Urban Development. As in the past, we will assess the resources proposed for the agencies in light of their obligation to carry out effective civil rights enforcement programs.

It remains essential, of course, that we have the most complete and accurate information possible for this evaluation. We also would like to be able to consider relevant views on Federal agencies' enforcement budgets and performance. We, therefore, would appreciate your providing copies of the latest reports the seven agencies named above filed under OMB Circular No. A-11-53 and the opportunity to review other A-11-53 reports as necessary. We also would like to know for FY 1983 the sums appropriated and staffing ceilings for the seven agencies under the first continuing resolution and second continuing resolution or relevant appropriations bill.

In addition, given the concerns you expressed about last year's report, would you please designate a member of your staff as liaison for this project so that we can benefit from OMB views as we begin our review. Please have your staff contact Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, at 254-6701.

Sincerely,

John Hope III

JOHN HOPE III
Acting Staff Director

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 29, 1982

Mr. John Hope, III
Acting Staff Director
United States Commission on Civil Rights
Washington D.C. 20425

Dear Mr. Hope:

Thank you for your letter of December 22 regarding your forthcoming study. I have designated Jim Brown of my staff to coordinate OMB's input into the study, with the understanding that OMB will review the study in draft form and be able to provide comments prior to its final publication. He can be reached on 395-3556.

Regarding your request for budget data, OMB has traditionally treated information submitted by agencies in support of their budget requests (including reports pursuant to Circular A-11) as confidential and has informed agencies in advance if any exceptions to this rule are to be made. In addition, while we stand ready to assist you in your analysis of the President's 1984 budget, no data bearing on it can, of course, be made available before the President has submitted it to Congress.

Sincerely,

Michael J. Horowitz
Counsel to the Director

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

JUL 2 8 1983

Mr. Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Horowitz:

As I wrote you on December 22, 1982, we are preparing the Commission's annual analysis of the Federal civil rights enforcement budget. We again would like to include some information on overall trends in this area. You wrote the Chairman on June 25, 1982 objecting to our last year's discussion because it was based on Office of Management and Budget (OMB) figures you said were inflated. Your letter included revised figures. These, however, do not correspond to figures OMB since has issued. There are additional discrepancies between figures in this year's "Special Analysis J: Civil Rights Activities" and Major Themes and Additional Budget Details, another OMB budget overview. The enclosed staff analysis specifies these and similar problems.

We hesitate to form conclusions about trends in total Federal civil rights enforcement spending without more confidence in the figures we would have to use. We, therefore, would appreciate your explaining the apparent discrepancies among OMB totals and related agency-specific discrepancies we have identified. Specifically, we ask that you address the items listed in section IV of the enclosed analysis. Your prompt response may enable us to include an overview of the Federal civil rights enforcement budget in our forthcoming analysis. We, therefore, would appreciate a reply by August 15.

If you have any questions about this request, please call Deborah P. Snow, Assistant Staff Director for Federal Civil Rights Evaluation, at 254-6701.

Sincerely,

JOHN HOPE III
Acting Staff Director

U.S. COMMISSION ON CIVIL RIGHTS

STAFF ANALYSIS
OF
OMB SPECIAL ANALYSIS J (CIVIL RIGHTS ACTIVITIES) FOR FY 1984
ACTUAL AND ESTIMATED OUTLAYS

The Office of Management and Budget (OMB) each year publishes, as Special Analysis J, an overview of the administration's proposed budget for civil rights enforcement. In keeping with the Commission's responsibilities for assessing Federal civil rights policies and improving civil rights-related information, staff reviewed this year's Special Analysis. We did not have access to all the agency reports on which it was based and, therefore, could not fully assess all the figures includes. Through careful study of the document and reference to other sources, however, we have identified various problems. 1/ These

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1/ In addition to the FY 1984 Special Analysis, we reviewed Executive Office of the President, OMB, "Special Analysis J: Civil Rights Activities," Special Analyses, Budget of the United States Government, Fiscal Year 1982 (hereafter cited as FY 1982 Special Analysis); The Budget of the United States Government, 1983, Special Analysis J: Civil Rights Activities (hereafter cited as FY 1983 Special Analysis); Budget of the United States Government, Fiscal Year 1984, Appendix (hereafter cited as FY 1984 Budget); and "Special Assistance: Federal Civil Rights Activities," Major Themes and Additional Budget Details, Fiscal Year 1984 (hereafter cited as Major Themes). We also reviewed budget information provided in Michael J. Horowitz, Counsel to the Director, OMB, letter to Clarence Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, June 25, 1982 (hereafter cited as Horowitz Letter), reports submitted under OMB Circular No. A-11-53 by several agencies with major civil rights enforcement responsibilities, and other agency budget-related documents, such as justifications of appropriations submitted to Congress. In addition to the problems summarized in this paper, we noted factual errors and misinterpretations or misleading presentations of reported data.

include many discrepancies in reported outlays for Federal civil rights enforcement. 2/

I. Discrepancies in Reported Total Outlays for 1980 and 1981

According to Table J-1 in this year's Special Analysis, Federal spending for civil rights enforcement was $512.6 million in 1980 and $543.4 million in 1981. The FY 1982 and 1983 Special Analyses reported spending for these years at $552.8 million and $524.6 million respectively. 3/ Footnote 1 in this year's Special Analysis explains that outlays have been revised to eliminate "extraneous expenditures" formerly included. The FY 1981 figure, however, is higher than the figure reported last year before such an adjustment was made. 4/ OMB, moreover, said it had made the same adjustment in figures it sent the Commission to correct last year's Special Analysis. 5/ Its figure for 1981 then was $3.9 million less than the outlay reported last year and $22.7 million less than the outlay now reported in Special

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2/ Of the 18 comparable total outlay figures in the sources we reviewed, only two agree. These are the substantially reduced outlays reported for the last year of the previous administration in Special Analysis J, Table J-1, and Major Themes, p. 127. Adjustments for inflation would widen the disparities noted. For the significance of such adjustments to show actual civil rights enforcement spending power, see U.S., Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (1982), pp. 6, 11, 24, 32, 42, 52 (hereafter cited as FY 1983 Budget Report).

3/ FY 1982 Special Analysis, p. 304; FY 1983 Special Analysis, p. 26.

4/ The footnote to Table J-1 explains that it reflects total outlays by all agencies in the current reporting base, including some that did not report in earlier years. This could explain somewhat higher figures. The alternative figures provided for only agencies that reported in each year the table covers, however, would account for less than $2 million of the $18.8 million increase over the 1981 figure reported last year.

5/ Horowitz Letter.

Analysis J. 6/ The 1981 figure reported in *Major Themes and Additional Budget Details*, another budget overview published by OMB, is about $1 million higher than the Special Analysis J figure. 7/ In short, OMB figures on spending for civil rights enforcement during the first year of this administration vary by more than $23 million dollars.

II. Discrepancies in Estimated Outlays for 1983 and 1984

Table J-1 reports 1982 actual outlays at $567.6 million and 1983 estimated outlays at $607.2 million. The FY 1983 Special Analysis estimated outlays for these years at $526.8 million and $535.8 million respectively. 8/ The difference between 1982 estimated and actual spending is explained. 9/ No explanation is offered for the much larger $71.4 million discrepancy between the 1983 estimates. The new Special Analysis 1983 estimate, moreover, is inconsistent with both the estimate OMB sent the Commission and the estimate published in *Major Themes*. 10/ Proposed outlays for 1984 also are inconsistent, the Special Analysis reporting nearly $2 million more than *Major Themes*. 11/

6/ Ibid. OMB's 1980 figure also was lower, but by only $1.6 million, than the figure now reported.

7/ *Major Themes* notes that its figures update and correct Special J Analysis figures.

8/ FY 1983 Special Analysis, p. 26.

9/ According to footnote 3, corrections in 1982 estimates by the Departments of Defense and Housing and Urban Development account for most of the difference. The footnote also states that the agencies represented in the FY 1983 Special Analysis actually spent over $4 million more than they projected.

10/ Horowitz Letter; *Major Themes*, p. 127. The 1983 estimate OMB sent the Commission was $531.4 million. The estimate in *Major Themes* is $607.3 million.

11/ *Major Themes*, p. 127. The Special Analysis total is reported in the text and in Table J-24, as well as Table J-1.

Finally, the total 1984 outlay projected in the Special Analysis is higher than the sum of 1984 outlays projected for categories of the Federal enforcement effort in Table J-25. 12/ Estimated 1984 expenditures by category total $630.7 million, $3.4 million less than the total 1984 estimate reported in the text and other tables. The breakout by category may not include outlays by the Postal Service and legislative branch, which are included in the overall total. 13/ This would not explain the discrepancy, however. Adding Postal Service and legislative branch outlays to the sum of outlays by category would yield $19.6 million more than the total the Special Analysis reports.

III. Discrepancies in Reported Outlays by Principal Civil Rights Enforcement Agencies

There are additional discrepancies in reported figures on actual and expected spending by principal civil rights enforcement agencies. Specifically, Table J-2 reports 1982 outlays by the Department of Health and Human Services' Office for Civil Rights at $19.1 million. This is over $2 million higher than the figure reported in the budget itself. 14/ Table J-2, moreover, apparently sometimes uses appropriations instead of outlay figures. Specifically, Table J-2 figures for the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) since 1981 correspond to actual and estimated

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12/ Categories are major types of Federal civil rights protections, such as fair housing, nondiscrimination in federally-assisted programs, and voting rights.

13/ Table J-24 notes that Postal Service and legislative branch outlays are included "for memorandum purposes only," suggesting they are not otherwise used in the Special Analysis.

14/ FY 1984 Budget, p. I-K52.

appropriations in the budget. 15/ These in all cases are higher than the outlays OFCCP reported to OMB. 16/ Since we have not been able to verify all outlays reported for principal civil rights enforcement agencies, there may be other problems in this area. 17/ They would be important because the problems we have identified may have inflated total outlay figures.

IV. Further Information Needed

Special Analysis J figures in the past have not been reliable. 18/ The inconsistencies we have identified cast doubt on this year's figures and others OMB has issued. To determine which, if any, total outlay figures are reliable enough to use in evaluating recent trends in Federal civil rights enforcement spending, at least the following information would be necessary:

a. What specific adjustments, agency by agency, OMB made in reported 1980 outlays that reduced the total so much and how OMB identified "extraneous expenditures;"

b. Why, if OMB made similar adjustments for later years, the 1981 total now reported in Special Analysis J is higher than the total reported in last year's Special Analysis;

c. Why the new Special Analysis J 1981 total is higher than the total OMB reported to the Commission last June;

15/ Ibid., p. I-013.

16/ Department of Labor, OFCCP, report submitted under OMB Circular No. A-11-53 for FY 1984 budget cycle. OFCCP estimated 1982 outlays at $40.5 million, 1983 outlays at $42.3 million, and 1984 outlays at $44.9 million.

17/ The trend in Education Department civil rights spending indicated in Table J-24, for example, apparently is skewed by the use of inconsistent reporting bases. The 1982 figure corresponds to the figure reported for the Department's Office for Civil Rights (OCR) in Table J-2. The 1983 and 1984 estimates are higher, however, suggesting that outlays other than OCR's were included for these years.

18/ FY 1983 Budget Report, p. 3; Horowitz Letter.

d. Why the 1981 total reported in Major Themes and Additional Budget Details is higher than previous OMB totals;

e. What specific corrections were made in Department of Defense and Department of Housing and Urban Development 1982 estimates;

f. What specific adjustments account for the fact that the 1983 total estimate reported in Special Analysis J is so much higher than the estimates in last year's Special Analysis and OMB's letter to the Commission;

g. What further adjustments account for the still higher 1983 estimate in Major Themes;

h. What corrections were made to the Special Analysis J 1984 estimate that produced the lower estimate in Major Themes;

i. Why the Special Analysis J total 1984 estimate is higher than the sum of 1984 estimates by category in Table J-25;

j. Why the Special Analysis J figure on 1982 outlays by the Department of Health and Human Services' Office for Civil Rights differs from the figure in the budget appendix and why the Special Analysis figures on 1982 and subsequent outlays by OFCCP correspond to appropriations rather than the outlays reported to OMB;

k. Whether these apparently inaccurate outlay figures for principal civil rights enforcement agencies affected Special Analysis J total outlay figures;

l. Whether OMB has identified other such problems in post-publication review of Special Analysis J and, if so, whether and what they require by way of adjustments in reported total outlays;

m. How much of the apparent increase in total 1984 outlays represents higher estimates for internal equal employment opportunity costs and whether OMB still believes, as it wrote the Commission last June, that figures in this area are "enormously susceptible to inflation;" and

n. What figures OMB now believes most accurately represent actual and projected spending for Federal civil rights enforcement for the years 1980 through 1984.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 29, 1983

Honorable Clarence Pendleton
Chairman,
U.S. Commission on Civil Rights
Washington D.C. 20425

Dear Clarence:

This will respond to the Acting Staff Director's letter of July 28, 1983 regarding the Special Analysis on Civil Rights which OMB published in January.

1. As stated in footnote 1 of the Special Analysis, OMB under this Administration eliminated the previous practice of reporting, as "civil rights expenditures", outlays for general administration, employee training and upward mobility not directly related to implementing civil rights requirements. Also excluded were agency outlays for minority business enterprise programs (first sought in connection with the 1983 Special Analysis).

2. It was brought to our attention that previously published figures on Fair Housing had inadvertantly excluded grants and other HUD expenditures for state and local efforts to implement Fair Housing. Outlay figures for the years 1980-1984 were each adjusted accordingly.

3. Corrections in the 1980 data were made to eliminate errors involving duplicate reporting of agency outlays (the most significant of which resulted from the formation of the Department of Education). Substantial differences between 1981 and 1982 actual outlays reported by DOD were attributed by DOD officials to more complete reporting, not an increase in the actual level of effort. This required recalculating the DOD 1981 outlay figure, and conforming adjustments to the total civil rights outlay figure for 1981, to avoid giving a misleading impression of the magnitude of the increase in total outlays between 1981 and 1982.

4. As the Major Themes volume explicitly notes, the figures included in that volume include updates and corrections to figures appearing in the Special Analysis. While the month between the publication of the Special Analysis and the Major Themes piece permitted many small refinements, the relatively insignificant differences (amounting to a change, e.g., of less than three thousandths of the total proposed civil rights outlays for 1984) are primarily attributable to corrections in actual and estimated outlays for the Department of Education's Office for Civil Rights.

OMB promised, and in my judgment delivered, a considerably improved Special Analysis -- and did so within the confines and deadlines of the budgetary process. By comparison, the the Acting Staff Director's letter is his first inquiry regarding documents published five and six months ago, and arrives when Congress has substantially completed work on the matters his future report would address. I would hope that neither of these delays have been timed to influence the outcome of political controversies in which the Acting Staff Director has an open and personal interest.

Sincerely,

Michael Horowitz

Michael J. Horowitz
Counsel to the Director

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

OCT 24 1983

Mr. Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Horowitz:

On reviewing your July 29, 1983, response to a Commission staff inquiry about inconsistencies and other problems in published Office of Management and Budget (OMB) information on civil rights enforcement spending, the Commissioners wish to protest your reference to the former Acting Staff Director's motives for the inquiry. We consider these remarks entirely unwarranted and inappropriate.

On December 22, 1982, the Acting Staff Director informed you the Commission would be following up earlier analyses with a review of proposed FY 1984 spending for selected civil rights enforcement agencies and invited your assistance in expediting our work. Your December 29, 1982, response declined to provide information that was then available to you (e.g., specific data on funds appropriated for the agencies in the two FY 1983 continuing resolutions, copies of agency reports to OMB), and we interpreted any liaison with your staff to be conditioned on a commitment to clear our report with you.

Consequently, with the express concurrence of the Commissioners, the staff pursued this inquiry with the individual agencies. This report was not intended to be an "instant analysis" of the President's budget message but instead a review of certain aspects of agency performance in the context of the resources allocated to them. The level of detail to be explored meant some information would not be available until agencies had completed their Congressional budget hearings and second quarter performance reviews. The issue of whether or which OMB data might be used was held in abeyance pending drafting of the report. At that point, staff addressed to you the series of questions about OMB data contained in the Acting Staff Director's July 28, 1983, letter.

We see no justification for your innuendo that the timing of that inquiry or the report relates to some personal motive or gain of the Acting Staff Director. The Commission's concern that more adequate resources be provided for civil rights enforcement is longstanding and wellknown to you. Timing of work on this project has been governed by Commission procedures, staff availability, and other program priorities. The Commission resents and rejects the unsubstantiated implication that its staff has acted improperly in this matter.

The Commission report (containing copies of this correspondence) will be published on November 14, 1983. Inasmuch as OMB currently is considering agency requests for FY 1985, we believe this detailed review could be helpful in determining how resources might be increased and reallocated to improve civil rights enforcement.

Sincerely,

FOR THE COMMISISONERS

Penny

CLARENCE M. PENDLETON, JR.
Chairman

APPENDIX B

In accordance with Commission policy, each agency reviewed in this report was afforded an opportunity to comment on the factual accuracy of an earlier draft of the chapter pertaining to it. Comments for all the agencies are reproduced here, along with Commission staff memoranda describing how they were accommodated. As the memoranda indicate, revisions were made based on the comments and additional information provided. In addition, conflicting views often were noted. The comments, therefore, at many points no longer correspond to the discussion in the report. Presenting them here does not signify concurrence with them.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

DATE: October 21, 1983

REPLY TO ATTN OF: OCFRE

SUBJECT: Revised ED/OCR, EEOC, HUD/FHEO and OFCCP Chapters of Enforcement Report

TO:

Linda Chavez
Staff Director

I am attaching for your review, as we discussed, copies of draft budget report sections on the above four agencies, revised in accordance with their comments, your and the Commissioners' review, and our further polishing. Also attached are copies of each agency's comments.

Wherever possible we incorporated factual corrections and new data. Staff made numerous followup telephone calls to staff at these agencies as part of this process. Some differences in interpretation or conclusions are noted in the text and notes of each chapter. In some instances, information provided by the agencies was inconsistent and could not be clarified by this time. Also, in some cases, the agencies made broad comments that were not relevant or appropriate to address in the report. The discussion below provides more specific guidance about how we treated comments on an agency-by-agency basis.

ED/OCR

The Assistant Secretary's comments on the ED/OCR chapter generally dealt with technical corrections and provided some information we had requested. In some instances the comments addressed material already deleted for various reasons.

Four general objections were raised. One was that we used 1980 data for OCR in HEW. Another questioned our reference to the small number of compliance reviews carried out in such a huge universe of recipients. A third objection was that staff who were cited in the chapter as sources for various points did not, according to the Assistant Secretary, make such points. The fourth was that too much of our material was "speculative."

The chapter now explains our use of the 1980 data, with footnotes citing the Assistant Secretary's concern and clarifying the reasons for our use of those data. We also added an explanation concerning the data used in the discussion of the relatively small number of compliance reviews. We were surprised by the Assistant Secretary's assertions that OCR staff could not be cited for some of the material in the chapter. A review of staff interview notes corroborated the accuracy of our documentation. Nonetheless, in each disputed instance we modified or dropped material to accommodate the Assistant Secretary.

Finally, we hoped to minimize speculativeness not only in this chapter but in all sections of the report by obtaining additional hard data from the agencies. As of today, we have not yet received requested updated information, such as the number of compliance reviews OCR conducted in FY 83, that would permit us to harden or alter some points. Our review of the chapter left us with the conclusion that, absent further data, its projections of expected enforcement outcomes at OCR - what OCR feels is unjustified speculation - are adequately grounded in fact and logic.

Revisions in this chapter based on the Assistant Secretary's letter are identified by the citation, "Singleton September Letter."

EEOC

Most of EEOC's comments were straightforward, offering new or corrected data and other specific information and were incorporated.

After reviewing the comments and discussing some of them with EEOC staff, we asked for certain additional data concerning, for example, the number of 300-day old complaints in its inventory in FY 83. We have not yet been provided that data. (We were informed that a manual count is necessary and has not been completed.) We also asked for but have not yet been given information concerning how EEOC's prolonged discussions with OFCCP this year over the latter's proposed new affirmative action regulations have affected EEOC's coordination plans for FY 83 and 84.

We have, however, been able to obtain some new information, such as EEOC's confirmation that it cannot handle the increasing numbers of Federal sector complaint appeals and hearings without additional staff in FY 84. We also have just learned, through a Wall St. Journal article, that EEOC reportedly has requested a significant increase in funds for its systemic program. EEOC did not deny the report, but would not confirm it either. Such additional information, and the changes made in accordance with EEOC's formal September 13 comments, are now identified in this chapter through the citations "Seal Letter" and "Seal September Interview."

HUD

The comments by the Assistant Secretary for Fair Housing provided a number of useful corrections and observations and also some new information which we incorporated in the HUD chapter of the budget report. A few comments were very general and only marginally relevant and others were not well-supported, but almost all were accommodated in some form. Examples of problems we faced in incorportating some HUD comments are as follows:

HUD made the general point that its enforcement of Title VIII cases is "substantially more effective." It claimed, for example, that the number of successful conciliations has increased, but it provided no data to support that conclusion. Nonetheless, by reviewing data received earlier from HUD, we were able to verify this point. The Department also claimed increases in monetary awards resulting from conciliations but provided no supporting data. This claim appears, from our review of HUD data, to be untrue. We nonetheless cite that claim as well, but note that we cannot subststantiate it with data provided us previously.

HUD also made a new point concerning the importance of its State and local program. The rather broad discussion of that point in the Assistant Secretary's letter provided nothing specific that we could add to the chapter, but we nonetheless briefly cited it in the revised draft. In addition, HUD asked for greater emphasis in the report on the administration's fair housing bill as evidence of the Department's strong civil rights commitment. The draft now includes a brief reference to that legislation. The report focuses, of course, on performance in the context of resources, not on lack of will or enforcement authority, so additional discussion of fair housing legislation did not seem germane.

Finally, the Assistant Secretary suggested that the chapter did not consider adequately Federal Government budget problems. This point is dealt with in the introduction and conclusion to the entire report as it relates to all agencies, not just HUD.

Changes in the HUD chapter are identified by the citation "Monroig Letter and Enclosures."

OFCCP

The Department of Labor's comments also were generally helpful in refining and updating some material in the OFCCP section of the enforcement budget report. In most cases, we were able to incorporate the information provided.

We were not able to accommodate the Department as it requested in several instances, however, where legal issues were involved. For example, the Department said that four cases could be cited in which it prevailed against allegations charging inadequate enforcement of Executive Order 11,246. It also said the report should be clarified to note that a new WEAL order had determined that the Department had "substantially complied" with the requirements of a previous WEAL order. Further, the Department said that "repeated" court rulings have made preaward reviews an ineffective inducement to compliance with Executive order requirements.

As noted in the attached copy of its legal sufficiency review of those points, OGC advised that the Department's recommendations could not be accepted. It found, for example, that only one of the four cases the Department cited supported its position. OGC also said that, contrary to the Department's comments, the new WEAL order made clear that the

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

ASSISTANT SECRETARY
FOR CIVIL RIGHTS

SEP 23 1983

Ms. Linda Chavez
Staff Director
United States Commission
on Civil Rights
Washington, D.C. 20425

Dear Ms. Chavez:

This is in response to your request for comments on the Commission's draft chapter on the Office for Civil Rights (OCR) in its report on enforcement agencies. We appreciate the opportunity to review and comment on the chapter before it is finalized.

There are a number of findings in the report which we question. They are outlined in the enclosure. Our major concern is that there are a number of instances where the document draws conclusions which are unsupported by the data presented. These are also outlined in the enclosure.

In several places, the report uses 1980 data but does not distinguish between data related to OCR in the former Department of Health, Education and Welfare (HEW) and that related to OCR in the Department of Education (ED). This distinction is particularly important when workload and resources are discussed. For example, the report notes that OCR's estimate of resources used for education enforcement activities in the Department of Health, Education and Welfare was 80 percent. However, the report fails to note that this figure was used solely for discussion purposes when the Determination Order covering the distribution of resources between ED and the Department of Health and Human Services was being drafted. It would be more appropriate to use the actual resource figure which the Office of Management and Budget assigned to OCR in ED, that is, 67 percent. Using the actual figure would have a significant impact on the discussion of budget and staffing resources.

Another area of concern is with the Complaint Processing section which notes the limited number of recipients which OCR can cover in its compliance review program. We do not dispute the fact that the program is limited in terms of the number of recipients that can be reviewed. However, we see no value in the point as presented since if OCR were to cover all recipients on an annual basis we would need over 10,000 employees. Moreover, we do not operate on the assumption that all recipients are in noncompliance with the civil rights statutes and, therefore, require compliance reviews. Most enforcement agencies are able to review only a small proportion of the institutions or businesses covered by the statutes they enforce.

The document questions the effectiveness of our compliance review program on the basis of slightly lower findings of discrimination. Not only do we find this approach superficial, but the difference in the numbers cited are not statistically significant. We acknowledge we do not know the cause for the decline in complaint receipts. However, we submit that the enforcement program has been enhanced by a large increase in the number of compliance reviews, which we agree are a more effective compliance mechanism. Compliance review starts nearly doubled in Fiscal Year 1982 over Fiscal Year 1981 and closures were up by approximately 35 percent. Through Third Quarter, Fiscal Year 1983, 204 compliance reviews were begun and 193 reviews were closed. We think these facts warrant greater attention.

You asked about the cost of a Vocational Education Survey to be conducted by OCR pursuant to the March 11, 1983 Adams order. If this survey were conducted in Fiscal Year 1984, we estimate it would cost about $800,000. You also asked about the impact of Adams complaint processing requirements on OCR's planning process. The new complaint processing requirements will have a limited impact on our planning process, to the extent that they provide for longer time frames for processing 20 percent of our cases and for tolling time frames for particular cases. These provisions of the order may have some effect on the allocation of OCR resources to carry out our statutory responsibilities and meet the requirements of the Adams order.

Please note that the requirements of the Adams order substantially limit OCR resources available for technical assistance activities. Given this limitation, we have attempted to enhance our technical assistance program through flexible staffing in our Regional Technical Assistance Staffs and through the design of in-house training programs.

Finally, I would like to note that I agreed to individual interviews of OCR staff by Commission representatives to facilitate the data gathering for the subject report. However, I am concerned about referencing OCR staff in the document as sources for information. In several cases, the references were incorrect. In other cases, the individuals interviewed failed to provide complete information. In the future, I would prefer that the Commission seek information directly from myself or the Deputy Assistant Secretary, Lauralee Over. This will allow appropriate coordination and review and eliminate potential miscommunication of information.

Specific comments on the document are enclosed. If you have any questions about our comments, feel free to contact Patricia Healy, my Executive Assistant, on 245-8431.

Sincerely,

Harry M. Singleton

Enclosure

SPECIFIC COMMENTS ON THE CIVIL RIGHTS COMMISSION'S CHAPTER ON OCR

1. Page 2, Footnote 6: The March 11, 1983 Adams order requires OCR to conduct a Vocational Education Survey; it does not require that the survey be conducted in Fiscal Year (FY) 84. The last Vocational Education Survey OCR conducted was in 1979.

2. Page 3, Line 4: There is no basis to state that OCR's ability to carry out judicial, as well as statutory, requirements would be jeopardized. OCR has no judicial requirements per se, rather we have judicially imposed requirements. It would be more accurate to state that OCR's ability to carry out its statutory responsibilities and the requirements of the court order could be jeopardized.

3. Page 3, Line 10: If the FY 1980 actual and appropriation figure for OCR in ED were used ($45,847,000) the loss would be approximately 20 percent ($9 million) rather than the 33 percent ($17.5 million) cited.

4. Page 3, Footnote 8: See comment 1 above with respect to conducting the Vocational Education Survey in FY 84. If OCR were to conduct the Survey in FY 84, we estimate it would cost about $800,000. There is currently a task force considering the possible scope and design of such a survey.

5. Page 3, Footnote 9: The figure of $6 million is incorrect. Even using the Commission's figures and data, the figure should read approximately $3 million instead of $6 million.

6. Page 4, 1980 (HEW) Appropriation: See comment 3 above. $45,847,000 was the official figure determined by OMB. The $53,953,000 figure was used for discussion purposes only and did not appear in any official budget documents nor represent an official estimation of the funds needed to support civil rights activities in education.

7. Page 5, Line 2: The statement that the agency [OCR] would be left with only 57 percent of the spending power it had to comply with the Adams order and increase effective enforcement activities in 1979 is not well supported. The FY 79 funding figure apparently used by the Commission is that used for discussion purposes during the drafting of the Determination Order. As noted above, no official budget document identifies the funding figure apparently used by the Commission.

8. Page 5, Line 5: The statement that OCR actually could wind up with even less than the budget proposed for FY 84 is speculative.

9. Page 6, Line 6: It is unclear whether the 1600 figure represents staff necessary for OCR in HEW to meet the court-ordered deadlines, or whether allowance has been made for the health related workload.

10. Page 7, c/: See note 3 above. We recommend using actual resources allocated rather than estimates used for discussion purposes.

11. Page 7, d/: The 1181 figure included 67 over employment positions which OCR in HEW was not permitted to fill.

12. Page 7, *e*/: OCR's ceiling was changed in FY 83 to a Full Time Equivalent figure (FTE). The FTE figure presents a more complete picture of staffing resources. The annualized current on board FTE staff as of July 30, 1983 was 943.

13. Page 8, Line 2: The basis for the 64 percent figure is unclear.

14. Page 8, Line 8: As noted in comment 12, it is more appropriate to use OCR's FY 83 FTE.

15. Page 10, Footnote 22: The reference to suspended processing of all cases in a number of categories because they involved issues about which some questions had been raised is vague. In fact, the cases involved complex and precedent setting policy issues which were under review by headquarters, as well as employment cases where several judicial circuits had ruled OCR did not have jurisdiction.

16. Page 10, Footnote 23: Mr. Esterly is not involved in *Adams* related activities and did not discuss this subject with Commission staff.

17. Page 10, Footnote 24: It is unclear what the referenced analyses of compliance information would involve. It should be noted that the *Adams* order requires increased analyses and reporting. The reference to "other important activities" is vague.

18. Page 11, Footnote 26: OCR's response to this inquiry is included in the cover letter to Ms. Chavez.

19. Page 12, Footnote 29: OCR has FY 82 data on successful versus unsuccessful mediation efforts from the implementation of ECR in all regional offices in November 1981 through September 1982. OCR will be analyzing FY 82 and FY 83 data to determine the effectiveness of ECR.

20. Page 13, Footnote 30: Should this be Browne interview rather than Brown interview?

21. Page 13, Footnote 32: The former Work Measurement System used by OCR was discontinued because of questions of the reliability of the data gathered and the excessive burden it placed on investigative staff. A new system is being implemented which will measure the amount of investigator time the expected complaint caseload will require. The statement that decisions about how to allocate resources not required for complaints have been delegated to regional office directors is not accurate. The regional directors must submit their nominations, along with justifications, for compliance review sites to the Assistant Secretary for approval.

22. Page 14, Line 3: While OCR planned fewer compliance reviews for FY 81 and FY 82 due to expected complaint receipts, it exceeded the planned number of reviews started for both years. The number of reviews planned for FY 83 and FY 84 is higher than the number planned for FY 80. Moreover, as soon as a reduction in complaints became apparent in FY 82, additional reviews were scheduled. The result is that compliance review activity has increased significantly.

23. Page 15, Line 2: The reference to institutions OCR believed were in serious violation of major civil rights requirements is misleading. OCR often uses survey data for the purpose of targeting compliance reviews. While OCR is more likely to schedule a compliance review when survey data show a statistically significant disparity at a particular institution, OCR does not consider that institution to have a "severe problem" on the basis of the disparity alone. The same problem occurs with the document's reference in line 7 to recipients apparently in severe noncompliance. The point that OCR's review program is limited is irrelevant since OCR would need over 10,000 employees to cover all of its recipients on a yearly basis.

24. Page 15, Footnote 41: There is no basis for raising the issue of the effectiveness of OCR's compliance reviews. The difference cited for FY 82 reviews is not statistically significant; moreover, the data does not conform with data used by OCR (74.4 percent for FY 81 and 74.7 percent for FY 82). OCR will send the Commission data for FY 83 reviews as soon as they are available.

25. Page 15, Footnote 42: The statement attributed to Ms. Anne Dooley is inaccurate. Ms. Dooley has no information on the cited subject and has not discussed it with Commission staff.

26. Page 16, Line 4: It is speculative to attribute "no great change" in the level of compliance review effort in FY 84 to a "steady decline" in staff resources. As the Commission noted earlier in the document, OCR has other subjects for its limited discretionary resources. More importantly, compliance review activity continues to increase, a fact not acknowledged in the report.

27. Page 16, Footnote 45: Under the *Adams* order, OCR must close 80 percent of all complaints and compliance reviews that had not been processed within the 1977 time frames by September 7, 1983. The remaining cases must be processed by March 10, 1984. The correct number of cases is 763 not 766.

28. Page 17, Line 7: The statement that "[R]esources for followup reviews to ensure compliance plans actually are carried out apparently will remain inadequate" is speculative.

29. Page 18, Footnote 53: OCR does not have regulatory authority under Title IX and Section 504 to require States to adopt Methods of Administration. A regulation has been proposed to extend the Methods of Administration requirement under Title VI to Title IX and Section 504. In the meantime, OCR will continue review of State Methods of Administration under Title VI and voluntary plans implemented by State agencies under Title IX and Section 504. Compliance reviews will be scheduled under Title VI when significant deficiencies are found in the annual audits.

30. Page 20, Footnote 60: Mr. Esterly's statement should read "In addition to previous training and on-the-job experience, staff have received a total of three or four days of training in Title VI and Title IX." He further noted that OCR regional offices involve their staff in regional Title VI and Title IX training, including training provided by contractors for recipients. Contractor training available to regional staff in FY 83 has included Title VI training on

the overrepresentation of black students in classes for the educable mentally retarded and training on the admission and recruitment of minority students to graduate and professional schools. A number of Regional Technical Assistance Staff members are former OCR investigators with background knowledge and experience with both Title VI and Title IX.

31. Page 20, Footnote 61: Although OCR had originally planned $8.1 million for technical assistance contracts in FY 81, this projection was revised to $4.1 million as a result of OCR's not receiving the planned pay supplemental for a governmentwide cost of living increase and other personnel related expenses.

32. Page 21, Line 1: The reduction in funds available for new technical assistance contracts resulted from the fact that total funds available to OCR under the continuing resolution were less than OCR had originally planned.

33. Page 21, Line 8: In FY 82 OCR developed a contract proposal for building State agency capacity in civil rights. This was to take the form of a survey to determine the comparability between State and Federal civil rights statutes. After further consideration, OCR determined it would be a better use of resources to develop Memoranda of Understanding (MOUs) with willing State agencies for cooperative activities. At this time OCR has entered into MOUs with New Hampshire, Pennsylvania, Texas, and West Virginia. Several other MOUs are in the discussion stage.

34. Page 21, Footnote 63: Past technical assistance contract efforts centered almost exclusively on Section 504. Due to OCR's more substantial experience with Title VI and Title IX, the Agency is better able to provide technical assistance in these areas without outside contracts.

35. Page 21, Footnote 67: The reference to FY 83 technical assistance funds is inaccurate. Mr. Clifford is not responsible for OCR budget operations. Ms. Billingsley stated that it is unlikely that any additional FY 83 funds (beyond the $1.4 million planned) would be available for technical assistance contracts.

36. Page 22, Footnote 69: OCR staffing reports show that the Regional Technical Assistance Staffs had 27 professional staff as of July 23, 1983.

37. Page 23, Line 4: The statement that ". . . funds . . . might not actually become available unless policies regarding OCR supplemental appropriations change," is speculative.

38. Page 23, Line 8: The concluding statement in the document appears overbroad in the reference to ". . . progress in its [OCR's] enforcement program." The conclusion is not adequately supported.

39. Page 23, Footnote 73: According to the current schedule, the technical assistance packages will be ready for use in the fourth quarter of FY 84. TA Projects Schedule, August 19, 1983.

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210

SEP 28 1983

Ms. Linda Chavez
Staff Director
United States Commission
on Civil Rights
Washington, D.C. 20425

Dear ~~Ms. Chavez~~: Linda

I would like to thank the Commission for inviting us to comment on its draft report evaluating the enforcement performance of the Office of Federal Contract Compliance Programs (OFCCP). Indeed, we welcome the opportunity to review the draft, and hope that our comments will enhance the quality of the final report. For your convenience, I have enclosed a point by point analysis of the draft, in an effort to correct a number of factual inaccuracies, misinterpretations, and omissions.

We were disappointed that this early draft failed to mention the notable accomplishments and program advances achieved by the agency. We believe that reporting efforts which contribute to noteworthy accomplishments in the area of civil rights enforcement, and sharing this information with the reading public and with sister enforcement agencies, can significantly enhance the enforcement effectiveness of all the civil rights programs. Similarly, we suggest that in areas where the Commission found "room for improvement" in program performance, ideas, advice, alternative approaches, and recommendations for improvements be included in the report. By so doing, we believe that the Commission's findings and recommendations will transcend the narrow confines of a given agency and have a salutary effect on the entire network of civil rights enforcement agencies.

Once again, I thank you for this opportunity and look forward to our continued collaboration toward an effective civil rights enforcement program.

Sincerely,

Bob

Robert B. Collyer
Deputy Under Secretary

Enclosures

Our comments on the Commission's draft report evaluating the enforcement performance of the Office of Federal Contract Compliance Programs (OFCCP) are as follows:

- *Page 1* (Enforcement Responsibilities)

  line 4-- To cover all contractual obligations required by the Executive Order and by the statutes governing the Handicapped and Veterans Programs, we suggest that these two sentences be revised to read (additions/revisions underlined): "...employment by Federal contractors *because of race, sex, religion, color, or national origin* and requires them to take affirmative action in hiring, promotion, pay and training to *assure nondiscrimination for* minorities and women. *Section 503 of the Rehabilitation Act of 1973 and 38 U.S.C. 2012 impose similar prohibitions and obligations on Federal contractors in their employment practices relating to qualified handicapped individuals and Vietnam Era and certain disabled veterans*.

  line 9-- The most accurate data we can obtain indicate that these authorities apply to 115,000 contractor establishments which employ more than a *quarter* of the Nation's workers.

  Footnote 4

  The Job Training Partnership Act of 1982, Public Law No. 97-300, Section 481, 96 Stat. 1390, requires OFCCP to issue regulations for *determining the degree to which a training program satisfies the contractor's affirmative action obligations.* We suggest that this more precise definition be used, as the Act only relates to contractor activities under the training/recruitment provisions of the contract compliance program.

- *Page 2*

  Text and Footnote 5

  We believe that this section of the report should present a more accurate and balanced representation of court decisions by including those rulings upholding OFCCP's effective and responsive enforcement of the laws. For example, it should be noted that all five orders mentioned in this footnote predate this Administration, or the Carter Administration. Rather than pointing only to past litigation, the Commission might consider noting that since 1981 OFCCP has prevailed in four mandamus actions.

In Washington Area Construction Industry v. Donovan, the federal district court in Washington, D.C., dismissed a motion seeking to extend and amplify an existing Consent Decree signed by the previous Administration as to construction activities in the Washington, D.C. area. The court was satisfied that the OFCCP was discharging its responsibilities and enforcing the contract compliance program in the construction industry in a responsible and diligent fashion. Similarly, in Taylor v. Donovan, a federal district judge in Philadelphia dismissed a complaint filed during the Carter Administration seeking to direct OFCCP's construction activities in the Philadelphia region. Also, in Welch v. Donovan, a federal district judge in Washington, D.C. dismissed a complaint seeking to compel OFCCP to undertake certain specific compliance reviews and preaward reviews. Finally, in Moon v. Donovan, a federal district court in the Western District of Georgia dismissed a complaint against OFCCP seeking to compel it to undertake enforcement proceedings against a government contractor. Also, the Commission may wish to note that the 1976 decree of the Ninth Circuit Court of Appeals in Alameda Legal Society v. Brennan, (LASAC Decree) has expired following OFCCP's compliance with it.

At a minimum, we hope you will clarify the impression created in line 5 of the footnote. The Federal District Court did not reaffirm the 1977 WEAL Decree, but rather issued a new Order after determining that the agency had substantially complied with the requirements of the 1977 Order.

* Page 3

line 3-- The resource reductions absorbed by OFCCP are not reflective of any policy change "...to scale back... enforcement efforts and rely more on voluntary compliance." This conclusion is not supported by the facts and is contrary to this agency's expressed policy. OFCCP has repeatedly stated that compliance with the Executive Order and statutes is mandatory. Further, in testimony before the House Subcommittee on Employment Opportunities and the Senate Committee on Labor and Human Resources, we testified that the OFCCP enforcement strategy has been expanded to include new program initiatives designed to encourage voluntary affirmative action by government contractors. These new program initiatives augment and complement the agency's usual enforcement activities. Despite the budgetary reductions experienced by the agency as part of the broadly-based, government-wide effort to reduce Federal spending, the OFCCP has conducted more compliance reviews than at any time since the consolidation of the program in 1978. First, looking at the number of compliance reviews conducted over the past five fiscal years, significant gains are clear:

FY 1979	FY 1980	FY 1981	FY 1982	FY 1983*
2,410	2,632	3,135	3,081	3,127

While records were not kept prior to FY 1981, we estimate that OFCCP reviews covered about 1.6 million jobs in FY 1980. In FY 1981, reviews encompassed 2,006,000 jobs; in FY 1982, 2,381,000 and for the first three quarters of FY 1983, over 2,235,000 jobs.

Turning to complaint activity, OFCCP has sharply increased efforts in this area to provide timely response to charges of discrimination. We have investigated more complaints than ever before as reflected in the following chart:

	FY 1980	FY 1981	FY 1982	FY 1983*
Complaints Completed	1,726	2,136	2,589	1,875
Complaint Inventory**	3,813	3,953	2,058	1,126

* As of end of third quarter FY 1983

** As of end of period.

The comprehensive screening procedures we have instituted have contributed to the almost total elimination of complaint backlogs and to effective case management by quickly referring or returning those complaints determined to be outside of OFCCP jurisdiction or which lack even prima facie merit.

Footnote 6

The agency has great difficulty understanding how former Under Secretary Lovell's testimony can be cited as a footnote in this context. The citation here would imply that Mr. Lovell's testimony supports the proposition that certain Court Orders reflect "OFCCP's longstanding inadequate monitoring of Federal Compliance Programs." It does not.

Footnote 7

line 3-- "The proposals would....require fewer contractors to report to OFCCP their employment activities, and offer a selection of affirmative action plans which, once approved would require minimal OFCCP scrutiny." This statement is misleading and should be clarified. If the required "report" refers to the written affirmative action plan (AAP), we would like to point out that OFCCP does not require contractors to file AAPs with the agency. These documents are maintained by contractors and are submitted to the government only when the agency selects the establishment for a compliance review. If this statement refers to the filing of EEO-1 and EEO-6 reports, then it should so state, making mention also of the fact that the OFCCP proposal would amend as reporting requirements to make them consistent with EEOC's requirements.

* Page 4 (Budget Totals)

First paragraph-- The correlation asserted in this section is not applicable to the operations of the OFCCP. In essence, "spending power" as defined is not an appropriate indicator of enforcement activity. Further, the use of broadly based GNP deflators, however valid, inaccurately depicts the implied effects on an agency such as the OFCCP. The OFCCP budget is almost entirely devoted to employee salary and expenses, travel, and office locations. Specifically, employee salary and benefits comprise approximately 70 to 80 percent of the budget. Federal salaries have not increased as rapidly as the GNP or economic indicators such as the Consumer Price Index, which are based on a variety of economic factors. Thus, to use such broad based deflators on a narrowly based budget yields a meaningless or at best distorted result.

line 12-- (Staffing and Other Resources)

The OFCCP was disappointed that this portion of the report did not consider extenuating circumstances which affected the agency's ability to make full use of authorized resources. We should emphasize that OFCCP never had the authority to fill the 1,482 positions theoretically authorized for FY 1980, due to the several and varied hiring freezes and other employment restrictions imposed government-wide since consolidation of the program in 1978 and through FY 1981.

Footnote 8

The assertion that the OFCCP volunteered to "...assume major funding and staffing reductions..." creates the inaccurate and misleading representation of the facts. The footnote implies that OFCCP in isolation sought these resource reductions. As is well known, these reductions represented just one of the many hard decisions made by virtually every Federal agency as the Administration and the Congress sought to reduce overall federal expenditures. During FY 1982, the Department of Labor operated under a Continuing Resolution. Consistent with standard budget practice, the $39.8 million requested for FY 1982 did not include an amount for comparability pay increases of $1.6 million for a total of $41.4 million. The $43.2 amount quoted in the chart on page 5 as "appropriated" in FY 1982 includes an additional $1.6 million re-programmed at the request of the agency to meet OFCCP obligations.

* Page 5 Table

Two of the displayed budget amounts are incorrect: for FY 1980, the correct amount should be $51,846, instead of $50,962; for FY 1981, the correct amount should be $50,086, instead of $49,318. The amounts shown on the draft reflect actual obligations. As displayed, the chart mixes apples and oranges.

* Page 6 Staffing Table

line 1-- The agency did not request a reduction in staffing from 1,008 to 979 positions for FY 1983, as suggested in this statement. As a federal agency, the Commission should be aware of the policy change by the Office of Management and Budget in its calculations of authorized staffing. Rather than authorizing a certain number of full-time permanent positions (FTP), OMB policy was amended to one of authorizing funding for a certain number of full-time equivalent (FTE) staff years. Previously, under the FTP concept, OMB would assume that "lapse rate" or percentage of positions which would be vacant at any given time and would, therefore, request funding for fewer positions than were authorized. The FTE concept eliminates this guesswork and permits greater flexibility in position management. We also found some inconsistencies in the Staffing Table relating to the number of actual employees on board. We are including a suggested, revised chart which displays the on board count at the end of year. An updated on board count as of July 31, 1983, is also included.

OFCCP STAFFING: 1980 - 1984 (Proposed)

Fiscal Year	Authorized	Actual Onboard
1980	1,482 a/	1,304 c/
1981	1,482 a	1,232 c/
1982	1,008 a/ 979 b/	988 c/
1983	979 b/	1,021 d/
1984 (Request)	979 b/	

a/ Number of full-time, permanent staff permitted under Congressional budget measures.

b/ Number of full-time, equivalent staff-years permitted.

c/ Number of staff actually employed by OFCCP, at end of fiscal year.

d/ As of July 31, 1983.

* Page 7

line 3-- The report states that "Without ...a (management information) system, OFCCP is hampered in assessing data contractors must report..." OFCCP is addressing its management information needs and developing a system that is most suitable and responsive to its program activities. As noted under footnote 11, the management information system envisioned in FY 1981 was not developed. However, the decision not to develop the system was reached after it was consciously determined that the planned system would not be cost-effective, and not, as the draft report purports, "...because (OFCCP) anticipated a scaled-back enforcement program."

The draft report fails to note that we are developing an enhanced OFCCP controlled and operated Compliance Review Information System (CRIS) to improve the quality, integrity, and timeliness of data used in evaluating contractor performance, as well as our own program performance. The CRIS system will enhance the capabilities of the system currently in place, will permit integration into other Department of Labor systems, and will incorporate additional data features on compliance reviews relating to the construction, handicapped worker, and veterans' programs. In addition, OFCCP is using a computerized screening of contractor employment data as one basis for scheduling contractor establishments for reviews. This approach permits a broader coverage of contractors and enables the agency to focus its attention on those employers with the most potential for increasing employment opportunities and/or with the greatest apparent need for scrutiny by the Federal government. We believe that these systems, in concert with other information components already in place, will satisfy the agency's information needs and do so at a much more economical cost.

line 9 and footnote 14-- The proposed FY 1984 budget does include a request for funding for the development and implementation of the CRIS system. Also, there is no connection, as inferred in this portion of the report, between the agency's desire to have the WEAL Order vacated and the development of a management information system.

* Page 8

line 5-- The draft text makes an allegation that the FY 1982 reductions in personnel reduced productivity, citing as support an interview statement made by Deputy Director Pugh regarding staff morale during the first quarter of FY 1982. OFCCP believes that a more appropriate indication of productivity is actual performance data for all of FY 1982. A review of that data shows that this allegation is contradicted by the agency's accomplishments in FY 1982 which demonstrate that productivity went up. In FY 1982, OFCCP conducted 3,081 compliance reviews and 2,589 complaint investigations, or 453 (21%) more complaint investigations than the previous year with 23% fewer resources. We also reduced the average number of staff hours required to conduct a nonconstruction compliance review from 200 hours in FY 1981, to 190 hours in FY 1982. For FY 1983 through the third quarter, nonconstruction on compliance reviews averaged 152 hours. The average time necessary for investigating complaints was substantially reduced from 66 hours in FY 1981 to 47 hours through the third quarter of FY 1983. We continue to achieve increases in productivity through internal management initiatives, procedural improvements, and greater performance accountability. Descriptive information on these management activities has already repeatedly been made available to the Commission.

footnote 16-- The second sentence of page 8 and the text under footnote 16 assert that more compliance reviews were conducted prior to consolidation of the program in the Department of Labor in 1978. OFCCP has always been careful not to cite pre-consolidation workload data for a number of reasons, not the least of which is the ill-defined and inconsistent recordkeeping systems maintained by the various agencies which did not provide a uniform base for comparison purposes. Specifically, one of the first discoveries made at the time of consolidation was that the previous accomplishment data were virtually meaningless. There existed no uniformity among agencies as to what constituted a compliance review; so that, oftentimes what was claimed by an agency to be a compliance review may have generated nothing more than a file check prior to contract award. In addition, anecdotal information related by employees transferred from certain compliance agencies indicate that double and treble counting of compliance actions may have been common in certain agencies. Consequently, pre-consolidation data is at best a questionable statistical resource, and the Commission's reliance on such data is similarly questionable. Further, the number of compliance reviews conducted in FY 1980 should be corrected to read 2,632 (see page 35 of the source document cited.)

* Page 9

footnote 18-- As drafted, line five of the footnote is misleading. OFCCP believes that it would be more accurate to describe the revisions to the program plan by stating, "In April, 1982, the agency reduced its planned compliance reviews by seven percent in order to increase planned complaint processing by 52 percent." Also the word "initially" should be removed from the thirteenth line of the footnote, as the cited planned accomplishments were revised and not the original plan figures.

footnote 19--The Commission appears to have concluded that complaints resolved during compliance reviews as well as any recruitment/referral/training agreements reached should be counted integrally as part of a compliance review action, rather than separately. Except for the physical on-site travel involved, the functions performed in these activities are very distinct from those performed during a compliance review. From a planning point of view, OFCCP does not specify time for these functions; it does, however, use it as a management device to encourage the efficient use of time by compliance officers. The functions are properly counted as distinct accomplishments. Indeed, linkage and referral agreements can be and are made with contractors who have been subject to neither a compliance review nor a complaint investigation.

* Page 10

footnote 20-- FY 1983 program plans were revised in May, 1983 because of delays in the final publication of the regulatory revisions. The first sentence of the footnote should thus read, " For FY 1983, OFCCP plans to conduct 4,068 reviews." Subsequent information permits the updating of the second sentence, "It exceeded its third quarter FY '83 goals by 317 reviews." (There were 2,810 reviews planned through the first three quarters, and 3,127 were completed.) Finally, the last sentence of the footnote should include the following condition: "It projects completion of 5,010 reviews in FY 1984, 34 percent more than in FY '83, if regulatory changes are made." The projection of 5,010 reviews includes those reviews which would be concluded at the completion of a desk audit in instances where no problem areas are identified, and compliance is apparent.

footnote 23-- As drafted, this footnote demonstrates a basic misunderstanding which leads the Commission to erroneous conclusions. The Commission appears to confuse the elapsed, calendar time for completing a review (60 days for finding and 30 days for conciliation) with the hour time standard (200 hours in FY 1981, 180 hours in FY 1982, and 160 hours in FY 1983 and 1984) for completing a non-construction compliance review. The two time measures are not interchangeable; the hours expended directly on a review actually relate to work performed sporadically rather than continuously, whereas elapsed calendar time refers to the calendar duration of the action. The hour time standard is both a planning and evaluation device and is based principally on observed increases in productivity as well as management's desire to stimulate greater productivity through challenging performance standards. Similarly the footnoted text should clearly reflect the fact that OFCCP has reduced the average hours allowed for compliance reviews.

* Page 11

line 1-- The words "time frames" should be replaced with average hours to comport with our earlier explanation of the difference between the two time concepts. (In light of this clarification, footnote 24 may require correction.) In addition, the implication that reduction in average hours "...may prevent staff from thoroughly investigating..." fails to be substantiated by the findings of case quality audits, accountability reviews, and other quality control measures being constantly applied by the agency. The agency believes case quality and consistency are as important as timeliness and the total number of actions. Indeed, the agency has found that the quality of reviews depends upon the quality of training and program guidance given to compliance officers, which combined with experience and objective enforcement of the laws contribute to the professionalism of the agency.

footnote 25-- Mr. Cisco recollects having said that time constraints " could make OFCCP a paper shuffling program..." This is a conditional statement and expresses a concern that has always been shared by this agency. To assure no compromise on quality and to allow the proficiency of compliance officers to reach the expected level, we have permitted the hours time standard for nonconstruction compliance reviews to remain at 160 hours for FY 1984.

- Page 12

line 1-- The statement contained in this sentence is inaccurate. The use of conciliation agreements is not limited to correcting and remedying systemic discrimination and executing a conciliation agreement is not tantamount to a finding of discrimination. Other violations of the Executive Order and regulations, such as omitting a major ingredient from an AAP or insufficient good faith efforts, could result in the use of a conciliation agreement to correct the violation.

footnote 26-- Several erroneous conclusions are drawn in this footnote. First, the OFCCP does not know and has never known the precise number of completed cases in which systemic discrimination was found. The outcome of cases is reported in terms of hires, promotions, restored benefits, handicapped accommodations, training, and other remedial relief. The agency reports suspected cases of systemic discrimination, not the specific outcome of these cases. The data cited in the Quarterly Review and Analysis Feedback reports show the number of suspected cases of systemic discrimination that are pending, closed or dropped from that category. (Please refer to page 5 under "Other Results" of the Fourth Quarter FY 1982 Feedback Report.) In many instances, suspected cases of discrimination are dropped when compliance officers examine the facts further and find no evidence. Thus, the inference may not be drawn that systemic discrimination was found in those cases reported as closed or dropped from the affected class category.

We must also point out that it is not possible to determine with precision the number of potential systemic discrimination cases identified in a given quarter. The data reported in the quarterly review and analysis process show only those suspected cases pending at the end of the quarter. Thus, if a suspected case of systemic discrimination was both identified and disposed of during the quarter, it would not be reported. The only indication that can be cited with certainty in the footnote is that the number of suspected affected classes pending has been declining. OFCCP attributes this particular phenomenon to greater proficiency by the staff in identifying systemic discrimination, resulting from extensive training and guidance in this area. Another factor in the decline may have been that there are fewer applicants -- i.e., traditionally, hiring of applicants is a major affected class issue -- during a period of economic downturn, thereby reducing the number of possibilities for affected classes of applicants.

footnote 27-- To correct factual data cited, for FY 1980, 743 Conciliation Agreements (CA's) executed included agreements for both compliance reviews and complaint cases. The data were not maintained separately that year, so that the exact percentage of conciliation agreements obtained in situations of non-compliance for each category cannot be determined. For FY 1981, the percentage of CA's for compliance reviews was 46 percent--that is, of 2,170 compliance reviews conducted, 1,006 resulted in the execution of conciliation agreements. For FY 1982, the correct percentage is thirty-three (33), not thirty-two as reported (636 CA's reached in 1,976 reviews). Through the third quarter of FY 1983, 3,117 compliance reviews have been completed, 1,973 contractors were found in violation, and 588 conciliation agreements (30 percent) were obtained.

* Page 13

line 1 and footnote 28-- The data shown are correct. However, total financial settlements reached through the first three quarters of FY 1983 indicate that financial settlements are no longer in decline. Total financial settlements during this period amounted to $10.5 million.

line 4-- As an update to this data, through the first three quarters of FY 1983, 63 percent of the reviews conducted resulted in findings of non-compliance.

lines 7 & 8-- The report draws an unsupported conclusion by stating that the execution of fewer conciliation agreements infers that the " quality of review is inadequate." An attempt to support this conclusion is made by quoting Mr. Robert B. Collyer, Deputy Under Secretary for Employment Standards, as testifying that "...employment disparities still exist among Federal contractors... ." In its proper context, this statement does not denote that either more contractors are discriminating or that the same number continues to discriminate. The statement merely reflects the agency's experiences in continuing to identify discrimination. To imply that Mr. Collyer's statement buttresses the conclusion drawn by the Commission is, at best, a distortion of the testimony.

* Page 14

line 4-- The assertion that "when Federal contracts are pending, these [preaward] reviews can stimulate prompt compliance" and its footnoted sources dating back to 1974 and 1976 fail to acknowledge the subsequent and repeated rulings of federal courts which have held that "passover" of contract awards is unconstitutional. In other words, denial of contract award constitutes debarment without due process. Thus, the previous "leverage" of preaward reviews is no longer effective as an inducement to the contractor. Further, OFCCP will continue to conduct preaward reviews as long as required by regulation. For program plan purposes, preawards are not treated as a separate element in the planning and reporting process.

* Page 15

footnote 41--To update this information, through the first three quarters of FY 1983, pending complaints declined by 45 percent, down to 1,126. OFCCP believes that elimination of its complaint backlog is an important acomplishment deserving of greater recognition, as improved delivery of services to program beneficiaries and contractors alike will be greatly enhanced once the workload becomes current.

*Page 16

Footnote 46 lists reasons that complaints are closed administratively. It should be noted that cases are closed for reasons other than those mentioned. A number of cases are closed administratively by OFCCP because satisfactory resolutions have been achieved and no further action is required by the agency. Because the complaint data processing system does not now capture specific complaint processing information in its entirety (it will in FY 1984) to assist in programming the data, OFCCP requested narrative information in the third quarter of FY 1983. The information furnished by field offices shows that of the 601 total complaint investigations/resolutions accomplished in the third quarter of FY 1983, 66 complaint cases were closed administratively because the violations were remedied satisfactorily after the agency's initial involvement but prior to the completion of a full on-site investigation. These sixty-six actions (66) were resolved as follows:

Agreement reached between contractor and complainant	46
Complainant hired/rehired	7
Accommodations made for a handicapped individual	1
Complaints resolved by contractors' internal reviews	9
Complainant placed on temporary disability	3

In summary, an administrative closure does not signify an absence of investigation; rather, it indicates that the agency is satisfied that the complaint has been resolved in accordance with the law and that all proper protections and remedies have been afforded.

*Page 17

line 8-- In referring to OFCCP's liaison group initiative to encourage voluntary affirmative action efforts and broaden communications with members of the public, the report states that, "Similar initiatives in the past have not proven an effective alternative... ." The OFCCP is not aware of any similar initiatives in this program area. If, however, such initiatives exist, we are disappointed that the Commission did not include in its report examples of such efforts. We believe that the utility of the Commission's study would be greatly enhanced if it shared those efforts for encouraging voluntary affirmative action which have proven unsuccessful, as well as those initiatives with promise that can serve as a model worthy of replication by civil rights enforcement agencies at the federal, state, and local levels everywhere. This sharing of experiences through such a widely distributed publication, as is the Commission's Report, would stimulate and cross-fertilize ideas and possibly enhance the performance of civil rights programs. As an update to footnote 48, there are presently 173 liaison groups in existence nationwide, all engaged in a variety of voluntary affirmative action activities.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

SEP 13 1983

Deborah P. Snow
Assistant Staff Director
for Federal Civil Rights Evaluation
United States Commission on Civil Rights
Washington, D.C. 20425

Dear Ms. Snow:

As requested, we have reviewed the draft report on EEOC's enforcement performance and resource allocation. Numerous specific comments and suggestions for change are enclosed.

From a general perspective, it is the unanimous conclusion of all of the staff members who have reviewed the draft report that it does not fairly or accurately describe the extensiveness of current program goals or achievements. The report appears to be obsessed with the concept that there is a direct and total relationship between the level of resources assigned to a particular function and the corresponding level of accomplishments produced. Based almost exclusively on this assumption, the report presents numerous negative conclusions about EEOC's current program. Those few positive statements which are included are tempered by an unflattering comparison to some vague standard of what could be achieved if there were no resource constraints.

While every Government program could justify and utilize additional resources, it is inaccurate to conclude that major resource constraints constitute a significant hinderance to the achievement of any current goal of the Commission. The Commission's current performance closely matches the levels previously attained when performance is measured by looking at actual benefits being produced. In addition, the Commission's current program is in many ways broader in scope than was the case in previous years. New initiatives, such as providing assistance to small and medium size businesses on how to comply with EEO laws and sending investigators into communities outside the immediate reach of EEOC's Field Offices to perform charge intake functions, will dramatically increase the impact of the Commission.

I would suggest that the tone and content of the report be substantially recast. EEOC staff realizes that employment discrimination remains a serious and pervasive problem in the United States. However, no particular purpose appears to be served by presenting such an unflattering portrait of this agency's current performance. Your report needs to equitably and more fully describe the correct achievements of EEOC in tackling the enormous problems which fall under its statutory mandate.

Sincerely,

John Seal

John Seal
Management Director

Enclosure

Page 2, paragraph 1

While increases have been small, there has been no noticeable impact on complaint backlog elimination, class and systemic discrimination investigation and litigation and coordination. In fact 90% of the backlogged pre-1979 complaints were eliminated in FY 1983, 92% increase in the number of cases filed over FY 1982 and no negative impact on our coordination responsibilities under Executive Order 12067.

Pages 2 and 3

Page 2 Budget Totals

The entire analysis on pages 2 and 3 are misleading. The analysis should be based on outlays and not budget authority since this most accurately reflects actual Commission expenditures. Moreover, comparing increases in the Commission's budget to GNP inflation rates is totally inappropriate. Nearly 70% of EEOC's expenditures are for personnel salaries and benefits. The increases needed in this object class should correspond to the annual cost of living adjustment for Federal employees not the GNP inflation rate. Similarly, expenditures in such categories as commercial telephones, postage, travel, FTS and supplies are adjusted according to the numbers of workdays in a year, not according to the inflation rate. The amount of funds provided to State and Local Agencies is also not influenced by inflation, but rather by a funding formula established by EEOC. The only portion of EEOC's entire budget which lends itself to the type of analysis you have presented relates to such small-line items as transportation, word processing, ADP use and equipment purchase. We strongly suggest you delete the entire content of pages 2 and 3.

Recommend this table replace the one on page 3

Appropriations and Outlays

FY 1980 through FY 1983
(in thousands of dollars)

	Appropriation	Outlays	Compensable Workdays	Federal Employees COL Adjustment
Fiscal Year 1980	124,562	130,841		
Salaries and benefits	(85,862)	(85,862)	262	
State and local grants	(15,000)	(15,694)		
Other	(23,700)	(29,285)		
Fiscal Year 1981	141,200	134,256		
Salaries and benefits	(93,860)	(93,860)	261	9.1
State and local grants	(18,000)	(15,233)		
Other	(29,340)	(25,163)		
Fiscal Year 1982	144,739	137,671		
Salaries and benefits	(96,873)	(96,873)	261	4.8
State and local grants	(18,500)	(16,776)		
Other	(29,366)	(24,022)		
Fiscal Year 1983	147,421 1/	145,694		
Salaries and benefits	(101,281)	(101,281)	261	4.0
State and local grants	(18,500)	(17,297)		
Other	(27,640)	(27,116)		
Fiscal Year 1984 (Estimate)	151,928 2/	150,136		
Salaries and benefits	(105,442)	(105,442)	260	3.5
State and local grants	(18,000)	(18,660)		(Proposed)
Other	(28,486)	(26,034)		

1/ Includes a 4.6 million pay raise supplemental
2/ 1984 House Allowance

Insert table for EEOC Full-time Permanent Staff Positions:

1980-1984 (Proposed)

Fiscal Year	Authorized a/	Actual b/
1980	3,777	3,433
1981	3,416	3,412
1982	3,326	3,149
1983	3,185	3,167 c/
1984 (Request)	3,185	

Page 6, Recommended change - Paragraph 2 - line 3

Averaging processing time should be 186 days and not 242.

Page 7 suggested change - footnote 12

12/ Since publication of the new referral rule (Title VI - Title VII Rule), the expected number of new charge receipts has been much less than originally estimated. This has been due in part to the exemption of the Department of Education from the rule because of the Adams case and the elimination of mixed cases from the rule. Receipts during the first three months of operation under the rule totalled less than 100 charges.

Page 8 - Footnote 13 - line 5

Shows 242 (average processing time) for FY 1982 and 180 for FY 1983.

Response: Average processing time for FY 1982 should be 186 days and 159 for FY 1983 (6 month report.)

Page 11, Recommended change - footnote 25 and the deletion of footnote 26, 27 and 28

Mr. Finney has stated that the paraphrases of his comments are a disturbing distortion of the interview which he had. Earlier on, the interviewer indicated that she wanted to take a comparative look at systemic operations. In that context, she asked for staff sizes in 1982 and 1983. The numbers which were given were approximates, and without editorial comment as to the workload.

In the investigations it was indicated that a prudent disposition of the pre-1979 charges was a 1983 priority, but we indicated a number of other priorities, including regeneration of targeting and screening operations, the development of target models, and the development of new charges.

Additionally, John Schmelzer said that some of the comments attributed to him in footnote 27 concerning Systemic Programs are incorrect. Mr. Schmelzer said the interviewer asked him about the 55 remaining charges. He did not suggest this number, but in fact, he explained he did not know whether this number was correct. Mr. Schmelzer also said he commented only on the elimination of Headquarters' Commissioner charges.

Page 12 suggested change following footnote 29

The characterization of our plans and expectations for 1984 operations (p.12) has no basis in any of our comments, and, indeed, ignores several key highlights of our 1984 plans which we shared with the interviewer, including:

1. 4-5 new systemic charges;
2. Several important settlement negotiations;
3. Refinements of the new targeting model for export to the field units;
4. A vigorous program to monitor settlement and consent decrees; and
5. A combination of at least ten new direct or intervention lawsuits.

Page 12 suggested change - footnote 31

- o Page 12, footnote 31 and accompanying text: The text following footnote 30 and footnote 31 should be changed to read: "Although EEOC staff litigation recommendations from field attorneys to the General Counsel increased between FY 1980 and FY 1981, the number of recommendations declined in FY 1982. 31/

  31/ EEOC staff recommended 393 cases in FY 1980, 469 in FY 1981, and 401 in FY 1982. EEOC FY 1981 Annual Report, p. 29; EEOC FY 1982 Annual Report (Draft), p.___. Cases recommended by field staff to the General Counsel are reviewed in headquarters for legal and factual sufficiency and are in turn recommended by the General Counsel to the Commission. The Commissison ultimately decides whether to authorize or reject litigation. Virtually all cases authorized by the Commission are filed in court."

Page 13 footnote 32 suggested change

- o Page 13, footnote 32: Suggest change footnote as follows (underlining indicating changes): "In FY 1980, the Commission authorized 322 cases; in FY 1981, it authorized 364 cases; and in FY 1982, it authorized 112. With respect to case filings, in FY 1980, EEOC filed 358 cases; in FY 1981, it filed 444 cases; and, in FY 1982, it filed 241....As of the end of the third quarter, FY 1983, it had filed 116. As of July 31, 1983, EEOC either had authorized for litigation, or had filed, a total of 205 cases in FY 1983. (Case filings include both direct suits and interventions, which must be authorized by the Commission itself, and subpoena enforcement and preliminary relief proceedings, which do not require Commission authorization.)..."

  [Note: The draft report's figure for case filings in FY 1980 is erroneous because it does not include subpoena enforcement suits. Subpoena enforcements have properly been included in the remaining case filing statistics.]

Page 13 - Footnote 37 suggested change

Footnote 37

- Page 13, text preceding footnote 37:
  Change as follows: "As of July 31, 1983, case authorizations for FY 1983 totalled 146. As of the end of the third quarter of FY 1983, benefits totalled $21.2 million."

Page 16 paragraph 2 suggested change

IV. Page 16, Second paragraph

The conclusion of the report that "loss of staff will result in little follow-up of past activity, few initiatives, and concentration of staff resources on coordination of regulations with other agencies" is incorrect.

We have developed two office objectives for FY '84, which have received tentative approval. One concerns providing guidance on Section 504 of the Rehabilitation Act of 1973; the other involves continued work with the Civil Rights portion of the A-11 budget submission including the development of an instructional manual. In addition, we are considering initiatives in several other areas.

Finally, of necessity, we must react to other agency regulations as received. Our reviews of these regulations are for the purpose of eliminating problems of duplication and inconsistency in Federal equal employment enforcement.

As such, this activity in conjunction without tentative goals and initiatives, means that problems of duplication and inconsistency in Federal equal employment enforcement will not "continue to receive limited attention."

Page 16, footnote 46 (Recommended change)

Coordination Division lost no function as a result of the 1982 reorganization. However, the Guidance Division, which is the other division in Coordination and Guidance Services, received part of the functions and part of the staff of the former Office of Policy Implementation.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

FICE OF THE ASSISTANT SECRETARY
R FAIR HOUSING AND EQUAL OPPORTUNITY

SEP 19 1983

Ms. Linda Chavez
Staff Director
United States Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Ms. Chavez:

Thank you for the opportunity to review the Commission's draft report on civil rights performance in HUD's Fair Housing and Equal Opportunity program. As you requested, I have enclosed a detailed description of the corrections that are necessary for factual accuracy and an attachment with technical corrections to the body and footnotes.

The following is a summary of the results of our program. They are discussed in detail later in my response:

> HUD Enforcement of Title VIII Cases is Substantially More Effective. The number of successful conciliations of housing discrimination cases has increased. The monetary compensation award in administratively processed cases is higher than ever before.
>
> The Program to Strengthen State and Local Enforcement Capability is a Success. Over 80 states and local governments are now sharing enforcement responsibility with HUD. This program has increased dramatically the resources which are available to fight housing discrimination. Many states and localities have laws stronger than Title VIII, thus increasing the remedies available to victims of discrimination. The draft report is silent about this leveraging impact, both in terms of resources and remedy.
>
> The Administration has Proposed Specific Amendments to Strengthen Title VIII and will Request the Resources Required to Carry out that New Authority. In his State of the Union Message, President Reagan made clear his intention to provide the missing ingredients to effective enforcement. The Administration has delivered on that promise by sending such a measure to Congress. There is no single more important initiative this Department could take, and we are committed to making it a reality.

Title VI/Section 109 Findings of Apparent Non-compliance Have More Than Doubled Since 1981. While the draft report focuses on interim steps in the processing of Title VI/109 complaints, it fails to note that the results of the process have improved markedly. In 1981 only 10% of the complaints resulted in a finding of apparent noncompliance. In 1982 the figure had risen to 14% and to 24% by the first half of 1983. Similarly, the percentage of Title VI/109 compliance reviews that have resulted in findings of apparent non-compliance has grown from 5% in FY 1980 to 29% in the first half of FY 1983.

While I appreciate your desire to assure the fundamental accuracy of the report by including a great deal of factual information and analysis, I am concerned that a focus on such indicators alone may create a false impression nonetheless. For example, it is accurate but not useful to cite the small decrease that occurred in FHEO's on-board staff, unless you also compare the treatment of civil rights staffing to all other staffing in the Department. As I later point out, FHEO staffing was treated more favorably than the staffing of the Department overall. Similarly, the report does not reveal that the Department has held FHEO relatively "harmless" when its program funding level is compared to the reductions in most other HUD programs. In fact, while there were adjustments in individual Department programs, the FHEO program as a whole increased from 1981 to 1983 while the total Housing and CPD programs decreased.

I am also concerned that the report fails to consider the National context which surrounds the entire Federal enforcement effort. Nowhere is there discussion of the serious budget crisis this country has faced over the past two years and of the significant shortfall of available resources to carry out many of this Nation's most critical needs and priorities.

We all agree that sufficient resources have not been provided to end discrimination in this country, but that judgment must be balanced by the overwhelming needs we have to provide for the poor, to help the unemployed and to provide for our National defense. In the face of such overwhelming deficits and critical needs, it is essential that this report take cognizance of the difficult choices we must make in using the scarce resources which are available. Put simply, it is less than accurate to call out the declining size of the total resources made available for civil rights without any mention of the severe reductions in many programs that have taken place in the National budget. In the total context, civil rights at HUD has been more than proportionately funded.

The material which follows is organized in the same order as the draft report. It discusses in more detail the specifics of the HUD program and the reasons that I believe we have made major progress in program effectiveness despite the increasing shortage of available resources.

Budget Totals

While there have been decreases in funding for programs and staffing throughout the Department, FHEO has been held "harmless" to a great extent. The following is a comparison of program budget authority and administrative funds provided in the three major program elements within the Department.

	1980	1981	1982	1983	1984
			(Dollars in Millions)		
FHEO:					
Program..............	$3.7	$5.7	$5.0	$5.7	$4.7
Salaries & Expenses..	18.4	21.1	22.3	23.3	NA
Subtotal...........	22.1	26.8	27.3	29.0	
Housing:					
Program..............	28,837.6	27,184.7	14,660.9	6,309.6	9,126.9
Salaries & Expenses..	242.7	259.9	252.4	261.5	NA
Subtotal...........	29,080.3	27,444.6	14,913.3	6,571.5	
CPD:					
Program..............	4,574.5	4,391.9	3,928.7	3,908.0	3,920.0
Salaries & Expenses..	64.1	63.9	62.2	61.4	NA
Subtotal...........	4,638.6	4,455.8	3,990.9	3,969.4	

Furthermore, if one compares the change in the total FHEO budget from FY 1980 to FY 1984 to the change in the Department's total budget (both in constant dollars), it is apparent that FHEO has been well supported. The FHEO budget remained unchanged these four years ($22,060,000 to $22,280,000--a 1% increase), while the Department's appropriation declined substantially in the same period ($35,687,194K in FY 1980 to $10,410,660K in FY 1984).

Similarly, while FHEO staff decreased, the reduction was substantially less than the Department as a whole. FHEO's on-board strength decreased from 610 in FY 1981 to 545 on June 30, 1983, a reduction of 10.7%; but the Department's on-board strength decreased by 17% as of June 30, 1983 (from 15,122 to 12,498).

Title VIII Program

The draft report would criticize the Department's record in the administrative enforcement of the Federal Fair Housing Law (Title VIII of the Civil Rights Act of 1968, as amended). The report would also indicate that serious questions exist regarding the use of State and local agencies administering fair housing laws recognized by the Secretary as providing rights and remedies which are substantially equivalent to the Federal Fair Housing Law.

We believe that the draft report does not reflect this Department's achievements under Title VIII of the Civil Rights Act of 1968, nor does it adequately address this Department's commitment to the Federal Fair Housing Law. Further, we do not believe that the conclusions made regarding State and local agencies are supported in the report.

The Department's records indicate that the number of fair housing complaints received increased from 3,039 in FY 1980 to 5,112 in FY 1982, a 68 percent increase. The number of Determinations to Resolve (DTR) made after HUD investigation of complaints increased by 23 percent over this same period. Cases with a DTR were successfully conciliated approximately 60 to 65 percent of the time and in 50 percent of these cases, complainants were provided with a dwelling.

During the same period, the number of States and localities with substantially equivalent fair housing laws increased from 38 to 69. HUD referral of Title VIII complaints to these agencies increased from 410 in FY 1980 to 2,679 in FY 1982 or a 553 percent increase. Based upon data maintained by HUD in its Complaint and Compliance Reporting System, the number of cases successfully conciliated by these agencies is comparable to HUD's success rate.

On July 12, 1983 the President submitted to Congress proposed amendments to the Federal Fair Housing Law. The Administration's proposal reflects the President's commitment, as stated in his State of the Union message, to effective enforcement of the Federal Fair Housing Law as an essential element for ensuring equal opportunity for all.

For some time many of us have recognized the enforcement shortcomings of the 1968 law. The Department has been working on strengthened enforcement since this Administration took office. Under the Administration Bill, the Secretary of HUD will still investigate and attempt to conciliate a complaint filed by an individual. If the conciliation effort fails, however, the Secretary would be authorized to refer the complaint to the Attorney General with a recommendation that he or she commence a District Court action for equitable relief or civil penalty. The proposal authorizes a civil penalty of up to $50,000 for a first offense and up to $100,000 for a second offense.

The Administration Bill would make bigotry in housing a very expensive proposition for those who discriminate. The new law would not only deter discrimination but would provide offenders with powerful incentives to enter into conciliation, which we have found to be the fastest and most effective procedure. On the average, conciliation produces a settlement within one hundred days, which is much faster than any court or administrative hearing process is likely to be.

The fair housing amendments proposed by the President offer prompt and effective means to enforce fair housing for all people. They are direct and clear. They broaden the enforcement process at the same time they strengthen the conciliation process.

We recommend that the draft report be revised to reflect the commitment of the Department to stronger enforcement authority as evidenced in the Administration's proposed Fair Housing Admendments Act and to more accurately describe the enforcement efforts of HUD and State and local agencies.

The draft report, on page 6, in discussing staffing, indicates that Fair Housing Headquarters staff assigned to Systemic Title VIII investigations was cut from five to two. The reference is footnote 22. This statement is incorrect. Headquarters staff assigned to systemic investigations was reduced from four (4) professionals to two (2). Three professionals were affected by the "RIF." However, one person who was reassigned to another office was simultaneously replaced by another staff person.

The report, on page 9, states that at the end of the first six months of FY 1983 the Title VIII backlog stood at 865. In the next sentence the draft report further states that only 11% of all closed FHEO cases met the requirement that investigations be conducted within 30 days. We believe this paragraph could be misconstrued to indicate that HUD is not processing complaints properly under Title VIII. The thirty day requirement relates only to the conduct of investigations. HUD's backlog (i.e., cases open more than 90 days) includes a substantial number of cases in which investigation is complete and in which conciliation is underway.

Historically, HUD has experienced difficulty in conducting investigations within 30 days, particulary in cases where substantial discovery is required or where a respondent fails to voluntarily cooperate with the HUD investigation. Recognizing this, HUD protects the rights of complainants by notifying them of their right to file suit within the allowed time regardless of whether HUD has been able to complete its investigation of the matter. This procedure, however, does not diminish continuing efforts by HUD to attempt to complete its investigations within the time required under Title VIII.

In addition, the inference that HUD has not investigated cases promptly by reference to cases which are over 90 days old is misleading. In fact, the language of Section 810 provides that only when a Federal court trial in a civil suit is brought by an individual is the Secretary required to cease efforts to resolve the case informally.

In discussing the backlog of cases at state and local agencies, the draft report concludes that the processing capability of these agencies is questionable. FHEO is committed to ensuring timely processing of referred cases. Clear guidance on this issue has been incorporated in all Memoranda of Understanding executed by HUD and the equivalent agencies since 1980. On August 4 of this year, this commitment was reaffirmed in a policy directive from the Office of the Assistant Secretary (see attached). We would also point out, however, that state and local agencies have had only a limited time to develop their working relationships with FHEO and to begin to prioritize housing cases under the FHAP. We expect these agencies to improve the timeliness of their processing of housing cases as the program continues.

Comparisons of monetary relief between HUD and state and local agencies (such as those on page 16) must be viewed with caution. Many state and local agencies emphasize early resolution of complaints wherever possible in order to obtain a unit or otherwise minimize damages. Moreover, it must be noted that the data on compensation used in the Commission's comparison excludes all state and local agency activity in the post-conciliation phase of case processing. It, therefore, fails to reflect monetary relief which these agencies are obtaining after public hearings, or as a result of settlements entered into once a public hearing has been scheduled. Although such relief is not presently contained in our CCRS (it will be once our ADP modifications are in place), there is reason to believe that if these results were included, overall state and local performance in obtaining monetary relief would be greater.

The draft report states on page 21 that while HUD estimated it would close 765 systemic cases during FY 1983, during the first six months of the fiscal year only 134 systemic cases were closed. The report then, asserting a calculation from HUD FY 1982 performance figures, determines that a total of 131 staff years would be required to achieve the HUD goal for systemic closures in FY 1983 and FY 1984, and concludes that HUD staff allocations fail to provide the staff needed to accomplish this objective.

As indicated earlier in the draft report, the Assistant Secretary for Fair Housing and Equal Opportunity has determined that a primary objective of the Title VIII enforcement effort is to expedite HUD procedures for the referral of systemic cases to DOJ for the initiation of civil actions. Since HUD systemic cases generally involve issues most likely to include pattern and practice issues, investigation of these cases remains a priority.

While the data on systemic closures in the first six months of FY 1983 is accurate, the number of cases involving systemic issues is increasing. Further, the reliance on closure data as the measure of HUD systemic processing is misleading, since it does not reflect complaints under investigation or in conciliation. In fact, at the close of the first half of FY 1983 HUD had 346 other systemic cases on hand and had made DTR's in 66 of those cases.

In view of the above, we question the validity of the conclusion, based on budget data of systemic case load and staff projections of previous fiscal years, that HUD will not concentrate efforts on systemic fair housing cases. In this regard, the Office of Fair Housing and Equal Opportunity will advise Regional Offices of the need to provide for prompt processing of cases which have systemic issues and take the necessary steps to expedite referral of unsuccessfully conciliated fair housing cases to DOJ for the initiation of civil actions.

Title VI Complaint Processing and Compliance Reviews

The discussion on Title VI/Section 109 complaint processing and compliance reviews focuses heavily on quantity rather than quality. This emphasis is misplaced and gives a misleading view of the program. For example, the number of open Title VI/Section 109 complaints has had a modest increase from FY 1981 to FY 1983, as the Commission draft points out. But when one examines findings of apparent noncompliance during that period, one finds that they have increased from 10% of complaints investigated in FY 1981, to 14% in FY 1982, to 24% in the first half of FY 1983. Thus, the program has become considerably more effective in identifying and correcting discriminatory practices.

The Department's strategy in the last few years proceeds on the assumption that we will never have the resources to conduct compliance reviews for more than a small percentage of the 13,500 recipients of HUD funds in any fiscal year. Thus, the important element becomes the selection of those recipients for review which are most likely to have compliance problems. To accomplish this goal, we point out that Field Office personnel (FHEO and program staff) generally make annual visits to all HUD entitlement cities and to most housing authorities. The observations of HUD Field Office staff on these visits and their review of data submitted by HUD recipients can help Regional Offices to concentrate their reviews on those recipients most likely to have problems. The following table demonstrates that this strategy is working:

Year	Percentage of Compliance Reviews With Non-compliance Findings
FY 1980	5
FY 1981	12
FY 1982	23
FY 1983 (1st half)	29

The Commission is in error in citing a sharp decline in program compliance reviews between FY 1981 and 1982 (p. 26). As noted on page Q-10 of the Justification for 1983 Estimate the number of compliance reviews was counted by authority through 1981, and this procedure resulted, in some cases, in the double counting of recipients. Beginning in 1982 the number of reviews and the number of recipients were equal, thus resulting in an apparent reduction in the number of recipients reviewed.

The Commission believes our compliance review goals for FY's 1983 and 1984 are ambitious. While there may be some shortfall in FY 1983, we believe the FY 1984 goal will be reached because of the issuance of the deskguides referred to in note 109 of the draft report. These guides, together with training of Regional compliance staff and increased use of desk audits, i.e., examining key compliance data from a city before going on-site and thus obviating the need for travel to communities not likely to have problems, should enable us to achieve our numerical objectives, while continuing to improve the quality of our reviews.

The draft report (p.p. 28-30) cites HUD's inattention to reviews of Low-Income Public Housing. The number of reviews in the HUD Atlanta, Chicago, and Fort Worth Regions has markedly increased in FY's 1982 and 1983. These Regions contain the largest numbers of PHA's with segregated or racially identifiable housing patterns. Increased numbers of findings of apparent noncompliance and compliance agreements have been the result. It has not been necessary to resort to the administrative hearing procedure to secure compliance, although that tool remains at hand if a PHA proves truly recalcitrant.

The Headquarters Investigative Unit (cited at p. 25) had planned to use innovative techniques to conduct large-city reviews, especially in the CDBG program. It proved infeasible not only because of travel costs, but because it would have required a far greater expenditure of staff than had been contemplated, at a time of increasingly scarce resources. The Regional FHEO Offices have continued to conduct large-city CDBG reviews, the quality of the reviews has continued to improve, and it should improve still further after issuances of the CDBG Deskguide and training. Headquarters Program Compliance Division staff have continued to participate in Regional compliance reviews, both to assist Regional staff and to learn from them.

Voluntary Compliance Program

The draft presented leaves the impression that the Community Housing Board activity is the only voluntary compliance program underway because the report does not include other voluntary program elements. We believe our voluntary efforts go far beyond what the draft describes.

This Administration has recognized that there are measures in addition to compliance and enforcement actions to achieve the equal opportunity objectives embodied in civil rights laws. We have launched a program of "Voluntary Compliance" which will allow us to better address those situations where institutionalized practices, or their results, have discriminated against protected classes. In many of these cases, the voluntary efforts of the public and private sectors can work more quickly and effectively to achieve change, thus allowing us to target our enforcement resources. The material which follows describes that program.

In 1972, the Department established the Office of Voluntary Compliance to administer programs designed to carry out Sections 808(e)(3), (5), and (8) and Section 809 of Title VIII. Within this Office, the Division of Housing and Community Development is responsible for working with national organizations, firms, Federal agencies, and state and local governments to assist them in developing voluntary fair housing programs and policies.

Listed below are programs that have been developed, and implemented and which meet the objectives of promoting equal housing opportunity, through cooperation of the public and private sectors:

- Voluntary Affirmative Marketing Agreements (VAMA)

The Office of Voluntary Compliance successfully negotiated and maintains affirmative marketing agreements with the top housing industry groups, and over 1,200 local real estate groups.

Successes have been achieved in the pursuit of the following goals:

> Promotion of a broad equal opportunity program designed to assure that housing will be marketed on a non-discriminatory basis; implementation of programs and activities to acquaint communities with the availability of equal housing opportunities; establishment of office procedures to ensure that there is no denial of equal professional service; promotion of the involvement of more minorities in the real estate industry; making educational materials and fair housing training available to real estate associates and brokers; and making materials available which explain the commitment of signatories to fair housing.

National agreements to promote fair housing have been signed with the National Associations of Realtors, Home Builders, Real Estate Brokers, and Real Estate License Law Officials. Presently, there are over 1,000 individual industry group member voluntary plans and agreements in execution across the country. The Agreements have led to continuous dialogue, discussion, and increased focus on fair housing within the real estate profession. Increased use of the Equal Opportunity Logo, fair housing training of real estate professionals, distribution of material on fair housing obligations of the real estate industry, are some of the accomplishments of the effort.

- 600 Community Housing Resource Boards Organized and 5.5 Million Dollars in Funding Support Given to CHRBs

All voluntary affirmative marketing agreements require HUD to organize Community Housing Resource Boards to assist signatory industry groups in monitoring and implementation. These Resource Boards consist of a cross section of representatives of influential community organizations throughout the metropolitan areas that have an interest in fair housing and equal opportunity. At the present time, 600 Resource Boards are functioning.

The intent of the program is to support activities that build the effectiveness of Resource Boards and increase their capacity to effectively plan and carry out activities that assist signatory realtor boards in fully implementing the conditions of the VAMA. Resource Boards monitor the local real estate boards as well as augment their education/outreach efforts.

Funding for the CHRB program began in FY 1981 with an appropriation of $2 million followed by a 1982 appropriation of $1.5 million, $2 million in 1983 and 1 million in 1984. Decreases in appropriations were due to obligating delays early on in the program. These delays have now been rectified and the obligations are matching the appropriations. We expect that the program will return to its full funding level in the future.

In FY 1982, HUD funded 90 Community Housing Resource Boards. Eighty-seven (87) more CHRBs received funds in September 1983.

. New Horizons Fair Housing Assistance Project

The Office of Voluntary Compliance conceived and implemented the New Horizons concept and has established 50 New Horizons Programs nationwide. The New Horizons Program was designed to enable the Secretary to carry out the legislative mandate of Title VIII of the 1968 Civil Rights Act, as amended. The Secretary is required under Section 808(e)(3) "to cooperate with and render technical assistance to Federal, State, and local and other public or private agencies, organization, and institutions which are formulating or carrying on the program to prevent or eliminate discriminatory practices," and Section 808(e)(5) "to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title."

The continuing intent of the New Horizons Program is to expand housing options by encouraging states, counties, cities and towns to utilize their local strategy as a way to develop and structure a broad range of activities in the governmental, private and public sectors which seek to affirmatively promote fair housing.

The New Horizons Program is an action oriented effort that is based upon a fair housing strategy developed after a communities' assessment of its fair housing problem and concerns. The comprehensive strategy is built upon four components: education, assistance to minority families, local compliance and special projects. The program requires short and long range goals that can be measured, time frames for the implementation and completion of activities and the identification of resources to be used.

Comprehensive strategies have been implemented in both large and small cities with activities developed to meet local needs. They include: developing fair housing ordinances; city-wide educational efforts; housing counseling; and establishing affirmative efforts with financial institutions.

Two (2) major initiatives were accomplished this year that fostered public/private sector cooperation. A sharing of success stories and increased dialogue offered a promise of cooperation between the public and private sectors that will impact on discriminatory practices in the housing field.

. Public/Private Partnership Symposiums Held Througout the Nation - Almost 2000 Participate at Six Regional Sites

The Office of Voluntary Compliance organized and directed six regional Symposiums on Public/Private Partnerships for Housing Opportunity. The broad range of discussion and dialogue focused on the success stories related to public/private sector cooperation. This effort was in response to President Reagan's call for private sector leadership and cooperation with the public sector in solving complex social problems.

Major real estate organizations, financial institutions, corporations city, state and Federal officials, participated in and attended the six regional symposiums.

The symposium series provided a forum for dialogue, and presented the opportunity to explore the concepts of public/private partnerships and voluntary action. Ideas, experiences, case histories and in-depth discussions were held with leaders who represented a broad range of interests. Existing public/private partnerships were discussed.

- National Community Housing Resource Board Conference - September 1982 - Event Attracts 400

The Office of Voluntary Compliance planned and accomplished this major Departmental initiative. More than 400 people from the public and private sectors, representing all regions of the country, attended this conference aimed at enhancing understanding of the CHRB process and goals. Major real estate organizations, city and state officials, HUD staff participated and were in attendance.

The voluntary compliance effort is primarily implemented in area offices nationwide. This enhanced responsibility at the local level enables local government, corporations, and citizens to participate in responding to long-standing social problems through increased cooperation that can institutionalize equal housing opportunity.

- Coordination of Federal Fair Housing Activities

The draft report cites HUD's failure to develop regulations to implement its responsibilities for coordination and leadership of Federal fair housing activities. However, the draft does not continue to point out that the Department believes that the better time to develop such implementing regulations is after the amendments to Title VIII have been adopted. To develop regulations to implement a law which will change in coverage, definitions, and sanctions would be a terrible waste of already scarce resources. The Department will move swiftly to develop such regulations and to carry out its leadership authority when the amendments have become law.

Once again, thank you for the opportunity to review your draft report. I hope the materials I have provided will help correct the inaccuracies and provide a perspective which is presently lacking in the draft. While all of us understand how large the task is and how limited are the resouces to carry it out, I sincerely believe that this Administration has taken major steps to improve civil rights performance and to strengthen the law to better serve us all.

Sincerely yours,

Antonio Monroig

Antonio Monroig
Assistant Secretary

Enclosures: Technical Corrections
Memorandum on Title VIII Recall Policy

TECHNICAL CORRECTIONS

Staffing

In FY 1980 the FHEO staff was increased by more than 13 percent rather than 12 percent.

In FY 1981 HUD initially sought to increase the FHEO staffing authorization by 23.6 percent rather than 19 percent.

Title VIII Program

Page 15, Re: Monitoring of State and Local Performance (end of footnote 60). In FY 1983 considerable activity occurred in the redesign of FHEO's ADP monitoring capability for State and local complaint processing. HUD's Office of Administration has committed resources in FY 1984 to implement these ADP improvements.

Page 17, Re: Training of Regional Staff on FHAP Implementation. The language appearing after footnote 65 through footnote 66 should be deleted and replaced with the following:

> HUD's Office of Administration has indicated to FHEO that sufficient funds will be available to permit a FHAP training session for Regional staff in FY 1984.

It should also be noted that Regional Title VIII staff will receive training in September 1983. The training will stress the need for monitoring complaints processed by state/local agencies. The training will cover monitoring activites that are now conducted by Regional Offices, as well as activities that should be conducted in the interim until the uniform complaint montoring system is in place and the Handbook is issued. Consequently, we anticipate that we will not lack the means to conduct our monitoring responsibilities.

Page 19, Re: Systemic Complaint Referral Activity. In FY 1981 four systemic cases representing 17 individual complaints were referred to DOJ. During FY 1982, three systemic cases representing ten individual complaints were forwarded to DOJ. Since the beginning of FY 1983 four systemic cases representing 30 individual complaints were referred to DOJ.

Program Compliance

Page 1, Note 4 - Change final period to comma and add "and in Federally-conducted programs."

Page 1, Note 5 - Line 3 - Strike the word "unreasonably."

Page 2, Note 6 - Line 3 - Change to read: "discrimination based on race, color, national origin, sex, age, and handicap."

Attachment
(Page 2 of 2)

Page 4, Note d/ - Line 2 - Change "1984" to "1983."

Page 10, Note 38 - Line 6 - Change Mr. Madison's title from "Special Assistant" to "Supervisory EO Specialist."

Page 12, Note 49, Line 1 - Change spelling of Mr. Pearl's first name to "Laurence."

Page 13, Note 50 - Line 2 - Change the words "of this year" to "in FY 1984"

Line 6 - Change "Complaint" to "Compliance."

Page 24, Line 7 - The third and fourth words are transposed.

Page 25, Note 99 - Line 1 - Change spelling of Mr. Pearl's first name to "Laurence."

Page 28, Line 7 - Change "HUD" to "FHEO" - The assessment referred to was an FHEO assessment, not a Departmental assessment.

Page 28, Note 110 - Line 1 - Typo - "program."

Page 29, Line 5 - Change "HUD" to "FHEO."

Page 30, Support for Voluntary Compliance

Line 7 - local groups of real estate professionals should read: local Boards of Realtors

Footnote 131 - James C. Cunningham, Jr., should read: James C. Cummings, Jr.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE
SISTANT SECRETARY FOR FAIR HOUSING
AND EQUAL OPPORTUNITY

AUG 4 1983

IN REPLY REFER TO:

MEMORANDUM FOR: All Regional Administrators, S

ATTENTION : All Regional Directors of Regional Fair Housing and Equal Opportunity, E

William E. Wyn for

FROM : Antonio Monroig, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT : Policy re: Recall/Reactivation of Complaints; Time Frames

The Office of Fair Housing Enforcement and Section 3 Compliance has recommended and I have approved the following policy regarding the above referenced subject:

1. That the language currently set out in 24 CFR 115, Recognition of Substantially Equivalent Laws, at paragraph 115.8(b)(5), be modified to establish a 45 day average processing time as the standard for completing an investigation, and where applicable, setting a complaint for conciliation. As it currently reads, the regulation sets out a 30-45 day "average" processing time. The amendment to 24 CFR 115 now pending in OGC will be modified to reflect this change before publication in the FEDERAL REGISTER.

2. That the specific 30/60/90 day time frames currently in use in the model Memorandum of Understanding be retained as the appropriate "periods of reference" after which HUD will recall/reactivate complaints absent an equivalent agency's clear demonstration that, in fact, timely processing has occurred, or can reasonably be expected to occur.

I have concluded that these time frames are consistent. The former represents an average processing time for all complaints and is a general guideline for measuring agency performance. The latter are the points in time at which each individual complaint will be considered for recall.

These policy determinations regarding timeliness of State and local agency processing in no way abridge HUD's right to recall a case at any other point in time where the rights of the parties or the interest of justice require such action. All Regional Offices should carefully monitor equivalent agency compliance with the 30/60/90 day "periods of reference."

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

DATE: October 24, 1983

REPLY TO ATTN OF: OFCRE

SUBJECT: Revised Civil Rights Division Chapter of Enforcement Report

TO:

Linda Chavez
Staff Director

I am attaching for your review and approval a copy of the draft enforcement report chapter on the Civil Rights Division, revised in response to the agency's comments and further research and polishing. Also attached are copies of the Division's comments and the draft it reviewed.

For the most part, the Division did not provide technical corrections or new information we could use. Rather, it objected in general terms to our overall assessment and provided its own. We had anticipated and, to some extent, already responded to such objections in the draft sent to you and the Commissioners. We have made further changes along the same lines in this latest draft.

Our general approach has been to add information on the Division's achievements so far as we were reasonably confident of accuracy and to summarize major Division views differing from the Commission's, with references to documents providing both viewpoints in detail. We believe this approach indicates the complexity of the issues without unduly extending the chapter or overwhelming it in technicalities. We also believe it offers a better balance and more effectively shows the Commission has considered opposing arguments than merely presenting our views and appending the Assistant Attorney General's speech to the SAC Chairs, as he suggested.

The following sequentially summarizes our responses to the comments.

Resources

The Division said we should recognize that most agencies have been squeezed by the administration's efforts to economize and that it has endeavored to get as much or more done with less. We have noted the efficiencies described and suggested they may have mitigated the impact of staff losses.

The Division also cited the adminstration's success in obtaining increased funds and staff for its activities in FY 84. We have not made this change because Congress has not yet adopted an FY 84 appropriation for the Justice Department. We have asked the Division several times for an update on its funding for both FY 83 and FY 84 and still are awaiting a response.

Voting Rights Act Implementation

We had not received a reply to the Commission's inquiry on voting rights enforcement at the time we transmitted the chapter for affected agency review. The draft sent to you and the Commissioners included some revisions based on preliminary study of that reply. In consultation with OPPR's voting rights staff we have incorporated additional information from the comments. Specifically, we have mentioned efforts toward more systematic monitoring, enforcement of amended section 2, and implementation of the new voter assistance provisions, also noting some limits in these initiatives or questions that cannot yet be resolved. We also have mentioned the forthcoming General Accounting Office study, which we understand generally confirms our assessment of voting rights monitoring.

Based on the Division's comments, we have modified our discussion of the use of examiners and observers, eliminating the suggestion that it has not followed up where the Commission identified problems. The question of how the Division targets jurisdictions for examiners and observers still has not been answered satisfactorily, and we so note.

Other Enforcement Issues

The Division had two major criticisms of this section. First, it said we understated its achievements. Some problems in this area, such as the scant treatment of criminal prosecutions, we already had taken steps toward correcting in the draft sent to you and the Commissioners. We further have amplified our discussion of these activities. We also have updated and expanded the Division's record in employment cases, using information from the comments and our own monitoring.

We have not expanded our discussion of innovative Division litigation as recommended. The list of examples in the comments did not provide enough information about the cases and, further, included some that may represent at most new areas of Division involvement rather than truly ground-breaking approaches. We asked for further information and were told it could take some time to assemble. Lacking the basis to form an independent judgment, we simply have noted the comment and our outstanding request.

The Division's second criticism is that our discussion lacks objectivity and should include both an explanation of its positions and where the Commission believes they depart from "the national consensus and agenda." This and the case-by-case comments following epitomize the fundamental policy debate we have been engaged in for the last several years. We, therefore, have sought to clarify both viewpoints and indicate, without rehashing, the complex arguments involved.

Specifically, we have noted the Division's general objection and prefaced our discussion by stating the issues are complicated and the policy differences fully spelled out in supporting documents cited. Where we had not already done so, we also have summarized the Division's views on major issues, using the speech to the SAC Chairs and similar statements. In addition, we have noted the Division's comments on its actions in specific cases.

The comments on this part verified our inference that the Division has adopted an intent standard for fair housing cases and provided a rationale for this policy shift. Since we had not seen the Division's reasoning on this point before, we asked OGC for a further review of the cases. According to OGC, the Division's statement that "lower courts have reached a confusing variety of conflicting results" is inaccurate, and its reliance on the Supreme Court's ruling in Arlington Heights misplaced. We, therefore, have noted the Division's position but also indicated, more clearly the preponderance of case law supporting an effects test under Title VIII.

Coordination

The Division commented that experience with the Executive order has led it to reduce its estimate of staffing requirements. In view of limits and delays in coordination activities, we continue to believe more staff are needed. We, however, have noted the comment.

The Division faulted our discussion of regulations for misrepresenting the coordination section's plans. Since this criticism reflects a misreading of a note that clearly applies only to Title IX, we have made no change. The Division also criticized the discussion for failing to indicate it had revised its estimate of the number of coordination regulations required and issued a prototype section 504 regulation instead of a coordination regulation. We have noted the comment about the revised estimate. Since the chapter already discussed the prototype, we have made no change on this specific point. We, however, have noted the Division's objection to our evaluation of the prototype and clarified the basis for our view.

The Division also said we minimized its role in reviewing agency issuances. We have revised to note considerable activity in this area. We have made other revisions to indicate more clearly that the Division can continue efforts to ensure consistency even without new coordination regulations. Finally, we have noted the Division's views that it can identify technical assistance needs adequately and added information about its review of training programs. We have not further modified our discussion of program monitoring because we did not know how to interpret the statement that "expanded on-site presence in the agencies was stressed" and, despite a request, received no clarification.

OGC is reviewing this draft for legal sufficiency. Since we have conferred on the revisions, I expect only minor technical changes will be required unless you wish further changes.

earlier order had not been followed. Further, in response to OFCRE staff followup on this point, OFCCP staff replied that they know of no basis for justifying the Deputy Under Secretary's assertion that the new WEAL order found in OFCCP compliance. (In fact, OFCCP staff most familiar with WEAL matters specifically contradicted it.) Finally, OGC said that courts have split on the preaward review matter, rather than ruling uniformally in a manner that undercut the leverage posed by preaward reviews. Further, the comments failed to note that OFCCP skirted this legal conflict in 1979 by establishing expedited hearing procedures for contractors determined ineligible to receive Federal contracts.

The changes that we could make are cited throughout the section as "Collyer Letter and Enclosure." A few new telephone interviews to OFCCP staff also are cited in the chapter to reflect further discussion with them over some of the Department's comments.

Conclusion

Consideration of the agency comments has led us in some specific areas to moderate our conclusions, but we have not found it necessary to alter the overall thrust of the draft report.

As necessary, OGC has reviewed new material. Unless you have further changes, these chapters are ready for resubmission to the Commissioners. If you wish, we can discuss with you more fully our handling of agency comments on these sections.

DEBORAH P. SNOW
Assistant Staff Director
For Federal Civil Rights Evaluation

Attachments

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 11, 1983

Ms. Linda Chavez
Staff Director
U.S. Commission on Civil Rights
1121 Vermont Avenue, N. W.
Washington, D. C. 20425

Dear Ms. Chavez:

Thank you for sharing the staff draft of the proposed report on the Civil Rights Division. We have carefully reviewed the draft and, I must say, I am shocked and surprised by the factual inaccuracies and faulty analysis throughout. I hope that by setting forth the facts and a more accurate description of the purpose and effects of our policies in some detail, it will assist you in revising the draft to present a fair appraisal of the important work we are doing.

Resources. The assessment that the appropriations available for the Division have not kept pace with inflation and, therefore, less resources are being devoted to civil rights enforcement than in 1980 fails to tell the whole story. First, virtually every government agency has had to face a serious financial squeeze in the Administration's effort to cut costs and increase efficiency. Our activities, as important as they are, have not been exempted. What we have tried to do -- and I think we have succeeded -- is to get as much or more done with less. This has taken a number of forms. First, we have expanded the use of our ADP litigation support system to allow lawyers to handle more (and more complicated) cases. Second, we have increased reliance on paralegal, part-time, student and temporary personnel. These efforts have released lawyers to address more legal issues by freeing them from necessary but intrusive non-legal work. As part of this effort, for example, we have recently hired a full-time statistician to consult with and advise our Title VII trial teams. Finally, we have taken some steps to reorganize and redirect our activities in ways that emphasize new priorities established by Congress. For example, we have established a special unit to enforce the recently amended Section 2 of the Voting Rights Act. (The subsequent discussion under Voting details the success of that unit.) Additional reorganizational efforts are presently under consideration.

While no head of an agency would ever concede that resources are abundantly sufficient, we must live and operate in the real world of budgets and scarce dollars. In that real world the Division has accomplished a great deal with limited resources. Moreover, because of increasing responsibilities the Administration obtained from Congress a significant increase for the Division in the 1984 budget (15 positions and $885,000) to enforce new provisions and increase ADP litigation support. This was one of the few increases granted to any component of the Justice Department, signaling the serious view taken of our enforcement responsibilities.

In the sections which follow, I spell out in some detail not only the inaccuracies in the report, but the enforcement strides we have been able to achieve, even with our limited resources.

Voting Rights Act Implementation. The draft report (pp. 10-16) concludes that because of resource limitations this effort has been "reactive," that there is no procedure for "systematically identifying jurisdictions that fail to file" submissions under Section 5, that federal examiners were not sent to jurisdictions where "the Commission identified problems," and that the Division had not responded to earlier Commission inquiries.

Let me first note that on September 21, 1983, a detailed response was made to many of the Commission's questions on the voting program. I refer you to that response (copy attached) which I believe will correct many of the misapprehensions set forth in the draft report. */

As my letter of September 21, 1983 documents, it is inaccurate and unfair to discuss this litigation effort as "reactive" or to conclude we have not taken systematic steps to require jurisdictions to seek preclearance. Indeed, in Mississippi every county's redistricting has been submitted under Section 5 precisely because of such systematic efforts. A similar effort is now underway in Louisiana.

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*/The draft report (p. 15, n. 35-36) notes that the GAO is conducting a study of the Division's voting rights enforcement effort. We are advised that this study is nearing completion and may be released in the near future. We suggest the Commission may wish to obtain and consider this report when it is available.

The complaint that we failed to send examiners to conduct registration in jurisdictions "identified" by the Commission in Mississippi and Georgia is hardly cause for concern in light of the actual facts and the steps we have taken in those counties (Clairborne and Hinds Counties in Mississippi and Johnson County in Georgia).

First, let me point out that under the Act the Attorney General has the responsibility to send examiners when he determines and certifies that certain statutory conditions exist within a jurisdiction. See 42 U.S.C. 1973(d). That determination now and historically has been made on the basis of a full investigation of the facts. Examiners are not dispatched unless such a state of facts can be certified and the simple "identification" of a jurisdiction by the Commission is legally insufficient to do more than cause such an inquiry to be made. In fact, we have spoken with persons in Clairborne County in each of our standard pre-election surveys and have uncovered no evidence of racially-based impediments to voter registration. Moreover, black electoral successes in this 75% black county also should be noted. Our information indicates that blacks occupy the position of sheriff, tax collector/assessor, circuit clerk and registrar, superintendent of education, as well as all five seats on the county school board, and a majority of the board of supervisors and of the election commission. We also routinely contact minorities in Hinds County. According to our latest information, the major concern with regard to voter registration in Hinds County was, as of June 1983, that there was such a large number of recent new registrants there might be problems in processing the registration papers; this influx of new voters was the result of additional voter registration opportunities provided by the county on Saturdays and at decentralized locations.

With regard to intimidation and harassment by the sheriff of Johnson County, Georgia, we obtained information in this regard during our coverage of the 1980 primary election there (we had 33 observers). This information was turned over to our Criminal Section which was investigating the sheriff's activities. After a thorough prosecutive evaluation of the FBI reports that investigation has been closed. We are now in the process of analyzing the information produced by that investigation to determine whether it is appropriate to pursue the matter further civilly.

Finally, on the question of resources, it is true that personnel in the Voting Section are pressed to keep up with their workload. The level of overtime in this section during the avalanche of submissions following the 1980 census was the highest in the Division. It is also true, however, that the Department has co-operated fully in making scarce resources available for this important work. Not only does the 1984 budget call for substantial increases, even prior to that personnel were detailed from other parts of the Division and the Department, extra part-time help was authorized and efficiency was increased through augmented ADP and microfiche equipment. I am extremely proud of the record we have compiled: a timely response to every single one of thousands of Section 5 submissions; an effective outreach to make sure changes were not implemented without preclearance; successfully defending the public interest in bailout suits; and, mounting an affirmative program of bringing suit against jurisdictions in violation of newly amended Section 2. Such an effort should be publicly commended.

Other Enforcement Issues (pp. 17-25)

This section of the draft report follows a brief acknowledgement of two examples of innovative litigation, with a strident criticism of positions taken by the Division in and out of court on a broad range of issues. The list of innovative cases is woefully incomplete and the criticism of policy "reversals" provides more heat than light by categorically condemning Division positions without any discussion -- or even legitimate description -- of their merits. A more complete and balanced description of both subjects follows.

Before taking up these matters, however, I must register my total consternation at the relegation of one of our most vital and significant programs to a footnote on page 17 of the draft. The successful criminal prosecution effort of cases of racial violence, involuntary servitude and police misconduct rank among the Division's proudest achievements. We receive and process about 1,000 complaints monthly, receive and review 3,500 FBI investigations annually, and present approximately 75 matters to federal grand juries and bring over 100 criminal charges to trial each year. This is a program that has nationwide impact and one, in my opinion, that ought to draw considerable praise from the Commission. Instead, it is given only casual mention and our undeniable record of achievement -- both in quantity and quality -- is dismissed with the incredible comment that "Sheer numbers of investigations conducted and suits filed or joined, however, do not adequately indicate whether resources have been committed to effective civil rights enforcement."

Convictions of migrant crew leaders for holding persons in involuntary servitude, successfully prosecuting New Orleans police for participating in a reign of terror in a black neighborhood, convicting U.S. Border Patrol officers who sexually abused alien women, prosecuting Klan and Nazi members for the Greensboro killings, obtaining a confession in a Klan lynching in Mobile, and dozens of other similar examples are just not "sheer numbers." This is an important and vital program that is currently more active than it has ever been. I urge the Commission to report honestly and factually on these activities so that the public can know the truth and I pledge full co-operation in making the complete facts available.

Turning to the draft's abbreviated list of ground breaking cases -- Yonkers and Cicero -- I suggest the following examples should also be included:

- the first case in which the government has successfully compelled a metropolitan park district to upgrade disparate services, personnel and equipment afforded minority neighborhoods;
- the formation of a special unit of lawyers to enforce Section 2 of the Voting Rights Act and the prosecution of a series of cases under that section;
- the innovative use of the Hobbs Act to convict persons who tortured illegal aliens;
- a lawsuit successfully challenging the redistricting of the New Mexico legislature for discrimination against Indians and Hispanics;
- obtaining a remedial order requiring that female prisoners in Kentucky be offered the same vocational training as male prisoners;
- a challenge to the pregnancy limitations of sick leave and disability insurance programs operated by Buffalo, New York and the State of Rhode Island as violative of Title VII as amended by the Pregnancy Discrimination Act of 1978;
- a successful challenge to Georgia's congressional plan proving it was unconstitutionally designed to limit black electoral power in one district even though it actually increased the black percentage;
- a fair housing action against a West Coast developer for using a racial quota system to limit the number of housing units available to minority applicants;

- an injunction against the City of Prior Lake, Minnesota for excluding Indians from voting by declaring reservation land was no longer in the city;
- a decree enjoining Indiana's exclusion of women from jobs at male prisons and requiring that most jobs be opened to women; and
- the first challenge to an institution of higher education for discrimination in hiring and promotion on the basis of sex.

While even this list is not exhaustive, it would afford a reader of the Commission's report a considerably better idea of the expanding frontiers of the Division's litigation program.

From pages 18 to 25 the draft report makes a wide-ranging criticism of several Division policies (failure to argue for an effects test for fair housing violations, failure to seek as remedies forced busing and race or sex preferential hiring and promotion) and also criticizes positions taken in individual cases (Bob Jones, Alien Children, Grove City and Guardians). My basic concern here is not so much with the authors' conclusions as with the almost total lack of objectivity. These cases and policies represent complex national legal, social and policy issues. There is ample room for discussion, debate and exchange of ideas. The Commission could perform a far greater public service by presenting a rational explanation of what our positions and policies are and where it believes -- if it does -- that we have strayed from the national consensus and agenda. Insisting, instead, on one-dimensional criticism of such policies, does little toward either illuminating the issues or identifying solutions.

For example, on September 12, 1983, the date you forwarded the draft to me, I addressed the Commission's Annual Conference of State Advisory Committee Chairpersons and tried to explain as clearly as I could what our remedial policy in education and employment discrimination cases is and the national philosophy on which it is based. The draft does not describe these policies and their underlying theories at all but simply characterizes them as (p. 22) "revers[ing] longstanding federal support for remedies needed to eliminate the effects of illegal discrimination." I believe it would aid the national dialogue on such significant matters if the Administration's positions were accurately portrayed, and to that end, authorize and request you to append the enclosed copy of my remarks to whatever report the Commission decides to publish.

The draft's approach also falls short of fair reporting by failing to document the results of our policies. For example, in the area of employment discrimination, save only for the passing mention of the Cicero case, the draft ignores the record of accomplishment since January, 1981 in bringing and securing relief in suits alleging discriminatory employment practices against blacks, Hispanics and women. Twenty-four (24) such suits have been filed under Title VII and Executive Order 11246 and other provisions of federal law alleging employment discrimination -- a number that compares favorably to the twenty-one (21) suits filed by this Division in the period from January, 1977 through September, 1979. During the same period of time, the Division obtained thirty-one (31) decrees in employment discrimination cases -- as compared with thirty (30) obtained in employment discrimination cases from January, 1977 through September, 1979.

Many of these suits were against major employers, and affect the rights of thousands of people -- such as those against the Fairfax County, Virginia, Jefferson County, Alabama, City of Little Rock, Arkansas, Nassau and Suffolk Counties, New York, and New York City Police Departments; Clayton, Gwinnett and Pasadena School Districts; and the Virginia Highway Department.

The back pay and other specific relief for victims of discriminatory practices obtained during this period also compares favorably with relief obtained in earlier periods. The decree in United States v. Fairfax County obtained in April, 1982 after trial and a favorable ruling on liability provided back pay of $2,750,000 to 685 claimants who had alleged harm as a result of the employer's conduct, with priority job offers to many of them. That back pay award was the largest ever obtained by this Department against a public employer. Similar relief was obtained in a number of other cases -- for example, the Division obtained $1,300,000 in back pay for over 130 persons in United States v. Nassau County (police department), and $808,000 in back pay in decrees covering Jefferson County, Birmingham and eleven (11) other municipalities in United States v. Jefferson County; and $900,000 in back pay in United States v. Duquesne Light Co. -- a suit filed to enforce E.O. 11246. Indeed, $7,704,500 in back pay awards were secured in the decrees obtained from January, 1981 through September, 1983 -- an amount which far exceeds the $1,951,050 obtained in decrees from January, 1977 through September, 1979.

Lastly, the report calls into question the Division's rejection of race or sex preferences in employment discrimination cases with respect to the hiring, promotion or layoff of non-victims. The legal, constitutional and historical bases for that policy have been explained repeatedly in testimony before congressional committees and speeches as well as in briefs filed in the Supreme Court and other courts. */

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*/Interestingly, public opinion strongly endorses our concerns with race/sex preferential relief. According to a New York Times report

(Footnoted continued on next page)

It is important to recognize that the policy of enhanced recruitment, with nondiscrimination in selection for hiring, promotion and assignment, and specific relief for victims of discrimination, has proved effective. Because the decrees obtained are two years old or less, our experience under the decrees is limited. Available information, however, indicates that the decrees can and do work to rectify established patterns of discrimination. In the case against the New Hampshire state police, for example, where no (0) woman had ever been hired as a trooper prior to the decree, our most recent information indicates 18 percent of the hires since the decree have been women. In one of our school district cases (Clayton County, Georgia), where the employer had been hiring blacks for only 4% of the teacher vacancies, after the decree, approximately 16% of the 338 teachers hired were black. Similarly, in one of our countywide suits (Fairfax County), the actual levels of recruitment for blacks and women, and the level of hiring, exceeded preconceived availability percentages.

For your information and possible use, I enclose a list of employment discrimination cases filed and consent decrees obtained during this Administration. I earnestly request that if the Commission intends to discuss our efforts in this area that it tell the whole story, especially including the effectiveness of our approach to relief without quotas.

With respect to the draft report's comments on the Division's failure to advance an "effects" test in litigation under the Fair Housing Act, the authors again present only one side of the story, asserting that the Division (p. 22) "apparently has chosen to restrict fair housing enforcement to cases of intentional discrimination although Title VIII requires no such limit." The supporting citations (p. 22, n. 54) do not fairly present the state of the law. The fact is that the Supreme Court has not yet resolved the proper standard of liability under Title VIII and the various lower courts have reached a confusing variety of conflicting results. Compare Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (1977), 558 F.2d 350 (6th Cir. 1977), cert. denied, 435 U.S. 908 (1978) and Boyd v. Lefrak, 509 F.2d 1110 (2nd Cir. 1975), cert. denied, 423 U.S. 896 (1975) with Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977) and United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978).

(Footnote continued from preceding page

published September 25, 1983 (p. 29), a poll sponsored by the Anti-Defamation League found that fully 73 percent of a cross section of the public "disapproved of giving members of minorities special advantages to rectify past discrimination." Even a 52 percent majority of non-white respondents expressed their opinion that hiring should be done on qualifications regardless of race or ethnic background.

Moreover, the language and legislative history, in my opinion, seem to support the view that the Act was aimed at purposeful discrimination. The Act proscribes discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race . . ." 42 U.S.C. §3604(b) (emphasis added). During legislative deliberations Senator Brooke, one of the sponsors, maintained that the Act would permit a person to "sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination." 114 Cong. Rec. 2283 (1968) (emphasis added). Similar references to purposeful discrimination appear throughout the floor debates.

Finally, it is decidedly the case that use of the intent standard does not -- and indeed in our experience has not -- preclude effective litigation under the Act. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court recognized that intent in such cases can be inferred from all of the attendant circumstances. Our position in court has relied on this circumstantial approach and concluded that the discrimination was in fact purposeful. See, e.g., Brief of the United States, United States v. City of Birmingham, E.D. Mich., No. 82-1599. In short, unless and until the Supreme Court holds otherwise, I believe that the correct posture for the Division in fair housing litigation is to continue to prove the existence of purposeful discrimination by use of the factors identified by the Court in Arlington Heights.

The draft report's critical treatment of the positions taken in individual cases is similarly superficial. In Bob Jones University v. United States and Goldsboro Christian Schools v. United States, _____ U.S. ____, 103 Sup. Ct. 2017 (1983), a review of the precedents and legislative history persuaded me that there had never been an express congressional grant of authority to the Internal Revenue Service to withhold tax exempt status from schools based on an administrative determination of admissions policy. While the Administration supports such a legislative grant, it felt that without it the Service was exceeding its authority and it was incumbent on the Department to raise the issue with the Court. The fact that the Court has now found that Congress, by failing to revoke it, had implied such authority after it had been exercised, in no way suggests that our position was maliciously conceived to somehow aid discriminating schools. The draft's cavalier, one-sentence description of our position as (p. 18) opposing "the well-established Federal policy denying tax exemption to racially discriminatory private schools," is simply incorrect and disingenuous.

Similarly, with reference to our position in the Alien Children case, */ it is a clear misstatement to characterize that position as (p. 19) a reversal of "former position that constitutional equal protection guarantees prohibit discrimination in education against alien children not lawfully admitted to the country." The government's brief plainly argued that such children were "persons" entitled to the protection of the Fourteenth Amendment. We did determine not to address the application of the Amendment to these facts: The real parties in interest, the State of Texas and the children's attorneys had fully briefed the issue and there was irreconcilable differences of opinion among government attorneys as to the proper position. Under those circumstances the decision to stand mute on an issue cannot fairly be called a policy reversal.

The abbreviated discussion (pp. 19-20) of our position in Grove City -- that we are "urging the Supreme Court . . . to limit Federal protections against sex discrimination in education under Title IX . . ." -- is equally distressing. In Grove City we argued that the college was required to comply with Title IX's assurance requirements -- the only issue in the case -- because it received federal funding in its student financial assistance program. This is simply omitted from the draft's discussion of the case. Because of the expansive opinion of the lower court, we advised the Supreme Court that our reading of its recent opinions required a program specific approach to Title IX (see e.g., North Haven Board of Education v. Bell, 456 U.S. 512 (1982)). I believe that to be the correct analysis of the state of the law. Court decisions holding that a single dollar of federal aid flowing to a school makes every activity -- athletic, financial or academic -- subject to federal regulation, are, in my opinion, inconsistent with congressional intent and controlling Supreme Court precedents. A full discussion of these issues by the Commission might help the public to better understand this complex area of the law.

The draft goes on to read volumes into the fact that the Department decided not to take a position in the Guardians case, involving the issue of whether Title VI requires proof of intentional discrimination. This determination was reached because of conflicting views among the affected federal agencies. In such circumstances, and others, the government frequently decides not to file a brief. The complexities of the issue -- the Supreme Court itself seemed deeply divided and troubled over the case -- indicate that the reflexive condemnation of the draft is overly simplistic.

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*/Plyler v. Doe, In Re: Alien Children Education Litigation, Texas v. Certain Named and Unnamed Undocumented Alien Children, _____ U.S. _____, 102 Sup. Ct. 2382 (1982).

Coordination. The issues raised by the Commission about the Division's coordination program can be grouped into three areas: (1) staffing, (2) regulations, and (3) program monitoring.

Staffing. The draft refers to a December 1980 "Proposed Implementation Plan" for Executive Order 12250 that had a possible staffing level of 57 for the Coordination and Review Section. Since the Executive Order was signed in November 1980, that estimate was made with almost no experience in carrying out the Order and should not be considered as an ideal level for the Section. Our actual work over the last three years with the issues and responsibilities of Executive Order 12250 supports the current (and requested FY '84-85) strength of 42 work years for the program.

Regulations. The program has made significant progress to ensure consistent, coordinated, and effective civil rights regulations from covered Federal agencies. Once again, the draft report refers to a 1980 plan that estimated the issues of five sets of coordination regulations. Our actual experience with the Executive Order has required modifications to this original estimate. The reference to the Oneglia Interview that we have "no immediate plans" to coordinate agency issuance of civil rights regulations reflects a misunderstanding of the comments offered in that interview.*/

Moreover, the Commission fails to note the significant role the Division plays in reviewing and approving agency regulations implementing civil rights provisions under the Executive Order. We have reviewed, recommended changes in, and recently approved 10 Section 504 federally assisted proposed or final rules, including those of the Civil Aeronautics Board and the Departments of Transportation, Defense, Interior, and Treasury.

The Section has also provided leadership on several related regulatory issues. Comments have been provided to agencies to assist in the development of a number of regulations still in the pre-publication stage. The Section worked closely with the Equal Employment Opportunity Commission (EEOC) on the joint Title VI-VII regulation and conducted a training session for representatives from all covered Federal agencies. The Section reviewed and approved the Department of Education's Privacy Act regulation as it applied to its civil rights programs. The Section forwarded comments to EEOC concerning the applicability of the joint Title VI-VII regulation to the Job Partnership Training Act. The Section reviewed and commented on the Department of Transportation's proposed regulation relating to nondiscrimination on the basis of handicap in its mass transit programs. The Department of Health and Human Services' "Baby Doe" regulation was reviewed and commented upon by the Section.

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*/Indeed, although the Commission criticized the Division's prototype regulation for federally conducted programs under Section 504, it failed to acknowledge that the prototype is in lieu of a departmental coordination regulation.

It is untrue that the Division has "narrowed" or weakened the civil rights protections afforded under Section 504 with respect to federally conducted programs. The prototype is patterned after the existing 504 guidelines for federally assisted programs, as interpreted by the courts. It largely tracks the language of the existing guidelines for the coordination of federally assisted programs. However, certain deviations are justified by court interpretations of Section 504 since publication of these guidelines in 1978. We have taken this approach because we believe Congress intended the government to fulfill the same Section 504 obligations as those imposed programmatically on recipients of Federal financial assistance.

After extensive analysis of comments from over 40 agencies and input from interested public interest groups and citizens, a model Section 504 regulation for federally conducted programs was sent to over 90 Federal agencies on April 15, 1983. The prototype will serve as a model for each agency to use, to the extent it chooses, in developing a proposed rule with respect to its own programs and activities. Among other things, the prototype requires that any agency's program, when viewed in its entirety, be readily accessible to and usable by handicapped persons. Moreover, the regulation provides that agencies must take appropriate steps to ensure effective communications with personnel of other Federal entities, applicants, participants, and members of the public, including the provision of auxiliary aids for hearing-impaired persons and sight-impaired persons. Agencies which administer a licensing or certification program may not do so in a manner that discriminates against handicapped persons on the basis of handicap. The prototype regulation also forbids agencies from using discriminatory criteria in the selection of procurement contractors. Further, the prototype regulation requires agencies to ensure effective communication with hearing-impaired and sight-impaired persons involved in hearings conducted by the agency. We believe that, in the next several months, the government's regulatory activity generated by the distribution of our prototype regulation will greatly advance the cause of equality of opportunity for handicapped citizens. Rather than leave this important area of civil rights enforcement unattended, the Department has provided needed guidance to the Federal agencies to insure an expedited promulgation by each of them of 504 regulations similar to the prototype.

Likewise, comments from 33 agencies and input from over 3,000 citizens and congressional letters were analyzed to determine whether to issue revised coordination guidelines for Section 504 federally assisted programs. The Attorney General had already adopted the 1978 Section 504 guidelines issued by the Department of Health, Education and Welfare. Our evaluation of the 1978 guidelines was prompted largely by a desire to clarify them in light of interpretations by both agencies and courts and in light of problems not anticipated when the guidelines were first developed. Many persons in the handicapped community, however, expressed serious reservations about proceeding with the revision process. These reservations led us to reconsider publication of a notice of proposed rulemaking. In March of this year, it was decided not to issue a revised regulation. Instead, where clarification or correction of the existing guidelines is needed or is recommended, the courts will continue to be the major avenue for change and further refinement.

The existing 504 guideline continues to be used by Federal agencies as they draft or interpret their own regulations applying to programs or activities that they fund. Those regulations, of course, must be interpreted in accordance with the guidance provided by court opinions. */ Thus, there is no difference in the standards an agency is expected to apply with respect to its federally conducted and federally assisted activities.

We have also reviewed, recommended changes in, and recently approved 26 final or proposed regulations implementing Section 504 with respect to federally assisted programs and other civil rights statutes.

Program Monitoring. The Section has established an ongoing network to communicate policies, provide technical assistance, and monitor the activities of covered Federal agencies. This network makes possible the continuing review of agency civil rights program operations to identify technical assistance needs and assess compliance with existing Department of Justice standards and policies. Beginning in 1982, expanded on-site presence in the agencies was stressed.

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*/The failure to do so will likely result in the judicial invalidation of a specific agency enforcement action or of the regulation itself. See American Public Transit Association v. Lewis, 655 F.2d 1272 (1981) (D.C. Cir.). Such a result, and the uncertainty which would follow, ill serve the cause of effective civil rights enforcement.

The report fails to mention the guidance provided by the Section in developing civil rights implementation plans with 23 agencies that are responsible for civil rights enforcement activities. For the first time agencies have provided the Department with long-range goals and priorities for civil rights enforcement and specified the concrete steps necessary for their achievement. The intensive negotiation process gave the Section the opportunity to identify problem areas and inconsistencies in agency enforcement programs and to pinpoint areas where technical assistance may be desirable to improve the quality of enforcement activities. The Section is now monitoring implementation of the negotiated implementation plans. These plans will promote more efficient use of civil rights resources and more effective civil rights programs.

In addition, the Section has already reviewed three major agencies' civil rights training programs in an effort to identify systemic problems in the area of training. As a follow-up, the Section plans to contact the remaining agencies within the next several months to continue our review of agencies' civil rights training programs.

While OMB Circular A-11-53 agency budget plans are useful to the Section in monitoring agency activities, we cannot comment on the internal policies of OMB concerning its need for information from our Section. The Commission notes that the Section has developed a model agency delegation agreement to improve both civil rights enforcement and the targeting of resources. The Section will continue its efforts to suggest activities appropriate for delegation.

Conclusion

I have taken the time to explain the policies of the Division and the manner in which we are carrying them out in some detail because I believe the Commission's judgment ought to be well informed as to what we are doing and why we are doing it. The Commission on Civil Rights has been called the keeper of the nation's conscience that provides independent apolitical advice on civil rights issues to Congress and the President. In my view publication of a report such as the draft reviewed here would detract from this laudable goal and could seriously impair any claim of objectivity and independence.

The civil rights laws enforced by this Division are extremely important measures and it is vital that enforcement policies and practices advance the congressional purpose. Unfortunately, the application of such laws create complex social, political and practical problems. In speeches and other communications I have attempted to be as straightforward and candid as I can in explaining what policies and priorities we choose and the underlying reasons. I welcome advice, counsel and even criticism from any quarter, particularly from the Commission. However, I do not believe that the approach of this draft is helpful to the effort. Repetitious condemnation of our policies and actions with no attempt to explain or understand either the positions taken or the problems addressed, and failing to even mention our successful programs seems more calculated to distort than to honestly evaluate the Division's effectiveness.

As always, we stand ready to provide any additional information the Commission may request.

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

DATE: NOV 2 1983

REPLY TO ATTN OF: OFCRE

SUBJECT: Revised HHS/OCR Chapter of Enforcement Report

TO:

Linda Chavez
Staff Director

I am attaching a copy of the draft enforcement chapter on the Office for Civil Rights at the Department of Health and Human Services, revised to take account of the agency's comments. Also attached is a copy of those comments.

The OCR Director provided some factual corrections, more recent data, and new information that we incorporated in the draft. There were numerous instances, however, in which the comments were confusing or self-contradictory and new information was inconsistent with that previously provided. Staff made followup telephone calls to OCR staff to verify or clarify these points. To the extent OCR staff provided clear explanations, modifications were made both in the text and footnotes. In cases where OCR did not respond to our requests for data that would allow us to correct inconsistencies, we so noted.

In general, OCR's major objection was that it believed the draft failed to present a more positive view of "new initiatives" it has undertaken. Among these initiatives, OCR focused its comments primarily on project reviews (described as having a more limited scope than compliance reviews but covering more recipients and emphasizing voluntary compliance). Wherever possible, information supporting its claims regarding these initiatives was included. Nevertheless, based on our previous experience in evaluating civil rights enforcement mechanisms, we continue to note their limitations and express reservations about making firm determinations at this time regarding their effectiveness.

OCR also noted that Commission staff had failed to include in the draft information previously provided by OCR staff, for example, on its activities coordinating enforcement of the Age Discrimination Act. While it is true some information had been acquired previously, OCR staff initially requested that it not be attributed to them. Thus, having no source for the information, it was omitted. Some of the information contained in the comment letter or clarified through followup phone calls now has been included.

Finally, OCR made a number of comments that were minimally relevant to the points discussed in the draft, but all were addressed in some way.

DEBORAH P. SNOW
Assistant Staff Director
for Federal Evaluation

Attachments

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

OCT 7 1983

Ms. Linda Chavez
Staff Director
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Ms. Chavez:

This will respond to your letter dated September 23, 1983 which transmitted a draft chapter of the report of your review of OCR's civil rights enforcement performance. We have carefully reviewed your draft report and have some very serious concerns with the interpretations you have applied to our new and ongoing civil rights compliance initiatives. These concerns are substantive in nature and should be appropriately considered prior to preparation of your final version to ensure the integrity of your report.

In order to ensure clarity, I will present my comments sequentially by page and footnote.

Page 2

We disagree with your interpretive statement concerning insufficiency of staff. OCR has developed new, more efficient and effective, methods for achieving its goals of eliminating discrimination and ensuring equal opportunity while increasing the productivity of staff. Additionally, OCR has continued to be able to set priorities on activities that focus on identified discriminatory practices. The remarks in this section and throughout the report fail to look at the extent to which the present OCR initiatives result in changes in recipient's practices and how the rate of change based on new initiatives (such as project reviews) exceeds previous year performance under traditional enforcement mechanisms.

Footnote 3 on page 2 should cite Titles VI and XVI of the Public Health Service Act as amended, 42 U.S.C. 3000-1(6), 42 U.S.C. 291 et seq , as the authority which requires Hill-Burton assisted facilities to provide services to all members of the community.

Page 3

Technically, your statement regarding the budget request is correct. Although the initial Carter Administration request for FY 1981 was $21,931,000, you have overlooked the March 1980 revision (-$1,850,000) to that request. This revision was the subject of a specific question raised by Commission staff and answered by OCR budget staff on September 15 (with a follow-up memo on September 20). In comparing budget requests and appropriate funds it would be more accurate if the Commission began with the FY 1981 request actually considered by the Congress. The considered request of $20,081,000 was only 2.2 percent higher than the FY 1980 funding level.

Further, the "Budget Totals" paragraph would be more clear and more correct if it were noted that the funding levels cited include appropriated funds only and do not include Social Security Trust Funds transfered to OCR to support civil rights activities. We have specified additional corrections on this matter in our comments regarding page 5 of your report.

It should be noted also, that the FY 1981 revised request of $20,081,000 included a request for 100 additional positions which was rejected by the Congress.

It appears that the sentence "During the last year, these efforts further have been limited by agency enforcement policies" refers to the reduction in attorney slots. (See pages 8 and 9 which reads: "This altered staffing pattern indicates OCR intends to take fewer enforcement actions,...,"). This is an erroneous conclusion. Our objective in realigning staff was to emphasize the preventive civil rights aspects of our compliance responsibilities. The objective then is "compliance" first which is in consonance with the legislative history surrounding Title VI. If our compliance objective fails, we will not hesitate to proceed with enforcement action (legal or administrative) as is required by law. We have adequate legal staff to accomplish this as may be required.

Page 4

Footnote 11 is based on suppositions that fail to consider that requests subsequent to FY 1981 have accounted for inflation, salary increases, and changes in workload that have all changed the funding required to support needed positions.

The second paragraph on page 4 states that the $200,000 increase from FY 1983 to FY 1984 would not keep OCR's "spending power" at the current level. This reflects an overemphasis on dollars when it is most important that the current level of services be maintained. Because services can be maintained or increased through productivity growth and management efficiencies, OCR believes that a limited increase in funding will support more civil rights activities than we carried out in the prior year.

Page 5

The table on budget totals and constant dollar comparisons contain serious errors. The FY 1980 and FY 1981 appropriation figures do not include trust fund transfers as indicated in the first footnote. The table should use appropriated funds only, or, it should consistently use total budget authority figures. If the first footnote is maintained as at present, the table should read as follows:

1980	22,004	22,004
1981	19,770	18,005
1982	19,716	16,765
1983	21,513	17,490
1984 (Request)	21,713	16,871

Page 6

The claim that OCR "needed" 100 additional positions was not accepted by the Congress. This is a case of picking a number that puts present staffing levels in their worst light. The report fails to address the fact that all agencies must operate under FTE ceilings imposed by OMB. These ceilings for all personnel (full-time and others) have always required full-time permanent on-board strength well below authorized position levels. Government and Department-wide hiring freezes have also played a part in keeping the staffing levels below authorizations.

Page 7

The table on this page misinterprets data provided to the Commission. The figures for FY 1981 and FY 1982 were end-of-year counts not starting counts as indicated in footnote b/. That footnote should read: "Number of full-time permanent staff actually on-board. Except as noted, figures are as of the end of the fiscal year." The "Actual" column should read:

1980	527
1981	496
1982	477
1983	469 c/(As of 12/30/82)
1984 (Request)	

The FY 1980 figure of 502 cited by the Commission was the number on board at the end of calendar 1979.

Page 8, Footnotes 17 and 18

The budgets submitted to Congress clearly indicate both an authorized position level and a compensable workyear level. The FY 1984 request was for 15 fewer positions and six fewer FTE than in FY 1983. It is misleading to say that "OCR agreed to lose an additional six full-time equivalent positions." This implies that OCR would be reduced 15 positions plus another 6 positions. This is not the case. The numbers for OCR personnel in the FY 1983 and FY 1983 and FY 1984 budgets are as follows:

Year	Positions	FTE
FY 1983	524	475
FY 1984	509	469
Difference	-15	-6

Footnote 18 has misused a staffing figure provided to the Commission. We do not expect to have 469 staff in FY 1984. We do expect to use 469 compensable workyears. In the course of using 469 workyears it is possible that the number of full-time permanent staff on-board at any particular point in the year could exceed 469.

Pages 8 and 9

OCR believes that the proposed level of legal staffing will adequately serve OCR's legal assistance needs. It is incorrect to assume that the reduction means that OCR will necessarily take fewer enforcement actions. Staff available for litigation will not be diminished. However, as indicated in the Director's testimony before the House Appropriations Subcommittee, we expect that preventive civil rights initiatives coupled with management efficiencies in case processing will decrease the level of attorney involvement in individual cases (Hearing pp. 1229-1230). That testimony clearly stated that the position reduction does not mean that the Department will refrain from taking enforcement action whenever such action is necessary (p. 1232).

Page 9, Footnote 21

This footnote leaves the impression that the Adams timeframes applied to health and human services complaints. The timeframes applied and apply only to education complaints.

Page 10, Footonte 23

OCR cannot explain the discrepancy between GAO figures and OCR figures as we do not know the source of the GAO data. OCR records show 1776 complaints received 10/1/79 to 9/30/80. OCR closed 1581 complaint cases during the same period.

Page 11, Footnote 26

The footnote does not indicate that the Commission asked for "actual" end-of-year data one month before the end of the year - an impossiblility. The last sentence implies that actual receipt and closure data through the end of August were not available. Such figures were available and would have been provided if the Commission had asked for them. What we couldn't provide on August 30 was an actual count as of September 30; thus, the projected figures were the best we could do. As of a report run on September 9, the actual figures were 1,033 complaints received and 1,057 complaints closed.

Footnote 27

The footnote should be revised to clearly state that the PEER report claimed that unsuccessful mediation adds to staff time involved in complaint resolution. As written, the statement unsubstantiatedly makes it appear as if this is unequivocal fact in all cases.

Page 13

OCR has been starting fewer new reviews because of our efforts to close long-standing reviews before beginning a new one. The Commission's emphasis on new starts does not take into consideration overall workload. If one looks at closure projections as a percentage of total compliance reviews on hand, one can see an increase in the percentage of total workload closed each year. Initiating reviews is easy if one is seeking only to display a numbers effect: Completing reviews is what is important. For example, in FY 1982 we closed 116 reviews. Our latest available data indicates that 191 reviews had been closed in FY 83 as of September 9. That figure is higher than our projection of 180 closures and represents a 65 percent increase over FY 1982 levels.

Footnote 34

OCR did not provide data on the actual number of reviews started because, as in the case of footnote 26, we were asked for end-of-year actuals one month before the end of the fiscal year. In fact, OCR had begun 126 reviews as of September 9, 1983. This is 16 more reviews than had been projected and consequently requires recalculation of the percentages in this footnote. Work continued on 222 reviews opened in prior years. Your report implies that OCR was uncooperative and had willfully withheld data. If the actual year-to-date data was desired that request was not communicated to OCR staff.

Paragraph 2 states, "Although complaints declined again in FY 83, an expedited resolution procedures were adopted, OCR expected to begin fewer compliance reviews than in any year since health and human services became its primary focus."

In response to this statement, our FY 84 budget presentation showed that OCR targeted 146 new compliance reviews for FY 83. In addition OCR targeted 300 Project Reviews which are a type of compliance review.

Pages 14 - 16

The focus of project reviews is too narrowly described. For example, Hill-Burton reports will be another source for targeting project reviews. Hill-Burton reviews will address substantive access issues (see footnote 37), thereby addressing potentially serious discrimination problems.

It is incorrect to state that project reviews do not result in formal findings of noncompliance. Footnote 40 cites page 1232 in the hearings as the source of this statement. There is no project review information on that page. Furthermore, on page 1233 the Director responded to Mr. Roybal's questions concerning "less than full review" by stating that: "In the event that a project review fails to obtain voluntary compliance, formal findings and negotiations will be required....enforcement action may result if compliance actions are not met."

Footnote 41 is supposition and was written without the benefit of evidence. Given that changes have been made in over 90 percent of the project reviews closed to date, it is hardly possible that project reviews will have limited effectiveness. Any type of review may have deterrent effective as well as a "ripple effect". Project reviews have resulted in requests from other institutions/facilities for assistance in achieving compliance.

Project reviews are compliance reviews with a limited scope that may or may not require an on-site investigation. Project reviews are designed to promote voluntary compliance by recipients through a non-adversarial OCR approach. When deficiencies are found the recipient is informed of the deficiencies and the action necessary to correct the problem. As of 9/15/83, 214 of 234 project reviews closed resulted in corrective action by the recipient.

If attempts to secure voluntary corrective action in a project review case fail, the recipient is scheduled for a full compliance review. Therefore, while it is true that the project review process itself does not provide a "basis for enforcement", the process does not preclude enforcement if enforcement action is warranted.

OCR's assessment is that hospitals have received the concept of project reviews very favorably. Their experience in dealing with OCR under the reviews has been very positive. This has been communicated throughout the hospital community. While this may not be deterrence, it provides an atmosphere for the achievement of change with a minimum investment of resources in a non-adversarial context. OCR believes that this does promote voluntary compliance.

At worst, any conclusion regarding the effectiveness of project reviews should be pending. However, the report seems anxious to dismiss this promising method as merely "increased" activity that takes the place of truly "effective" activity (e.g., full-scale compliance reviews). The report fails to explain that the breadth of coverage afforded by project reviews has significant implications for beneficiaries and for identification of those problems that can only be addressed through a full-scale compliance review.

The report states that project reviews vs. compliance reviews is a "doubtful trade off between increased and effective activity." However, OCR strongly believes that a success rate for change in 214 out of 234 cases is very effective activity.

Page 18

We question the rather "sweeping" conclusion that OCR has not "developed a coherent program" to address our civil rights responsibilities under block grants. In fact, we have communicated with Governor's offices to establish liaison contacts, and regional staff have held follow-up meetings with gubernatorial staff to establish procedures by which we (OCR) will implement the 60-day referral provision under the block grant legislation.

Further, Regional staff have been formally trained on the unique aspects of block grant civil rights compliance; written procedures have been incorporated into the Investigative Procedures Manual; and Voluntary Compliance and Outreach staff have been instructed on various methodologies for providing technical assistance to States and informing beneficiaries of their rights under block grants.

In addition to our voluntary compliance and outreach initiative related to block grants, you are aware that we have actively participated in block grants hearings (throughout several regions) of Advisory Committees to the Commission in order to accurately convey to the public at large, the framework under which OCR is operating to ensure civil rights compliance is obtained in the block grant programs.

Regarding footnote 50, it should be noted that the correct title for Marcella Haynes is Chief, Special Projects Branch within the Division of Policy and Special Projects. Additionally, OCR developed block grant nondiscrimination draft regulations and in February 1983 submitted them for clearance to the Department of Justice and the EEOC as is required by Executive Order. Absent approved regulations, OCR has utilized statutory language to begin implementation of block grant compliance activities. The statutory language adopts by reference the existing civil rights laws - (Title VI, Section 504 the Age Discrimination Act, and Title IX) which, therefore provides us standards on which to proceed with investigations and reviews that fall within these categories.

With respect to footnote 53, OCR's posture relative to conducting block grant reviews was modified in instructions on the Annual Operating Plan to allow each region to under take a review of one block grant program at the State Agency level. Details concerning the reviews are being finalized. OCR staff could have provided this updated information to the Commission; however, an appropriate inquiry was not made.

Page 19

The statement that "civil rights enforcement in block grants has been hindered by inadequate resources" presupposes a greater involvement by States than OCR has proposed or determined is legally permissible under civil rights law. Compliance related activities may be delegated to States as is found to be both feasible and viable but delegation of enforcement has never been a basis of discussion. OCR will continue to actively enforce cases of noncompliance recipients whether under block grant or non-block grant funds. The lack of formally completing the planned pilot project has in no way diminished OCRs capacity to ensure civil rights compliance under the block grant program.

Pages 19 - 23

The report seems to convey an inaccurate assumption that the only index of effective technical assistance is the amount of money supporting contract activity. The Commission has failed to ask for data on the number of contacts (increasing), seminars/meetings, in-house development of materials and dissemination of thousands of documents to beneficiaries. The Commission also did not ask for data on the impact of outreach activities and the substantive changes resulting from these activities. We have data sufficient to dispel this assumption and will be happy to provide it to you in the interest of accuracy.

Footnote 60 states..."resources for technical assistance have been severely limited."

To the contrary, the transfer of 44 positions to the Voluntary Compliance and Outreach (VCO) activity is a substantial increase in resources for technical assistance. Outreach is another term for technial assistance and technical assistance is an integral part of voluntary compliance. In addition, it is the policy of OCR that evey investigator in the field has a responsibility to provide technical assistance at every opportunity.

Page 20, Footnote 61

As you were advised OCR did not fund new technical assistance contracts after FY 1981. The first full paragraph on the page is incorrect. It whould read: "Beginning in FY 1982, OCR has not funded new technical assistance contracts."

Page 20, Footnote 62

It is unclear how the 88 percent figure was derived. Our budget staff was asked for a listing of FY 1981 contracts. From our review of available information on FY 1981 technical assistance contracts, it appears as if no more than 22 percent of the funds supported contracts related to Section 504 assistance.

Page 21, Footnote 65

The citation concerning publication of block grant regulations should be corrected to read: "pp. 1232, 1236." Additionally, there is an inference in the footnote that, because the Director mentioned plans to provide training on block grants (p. 1236) but did not mention training on age discrimination regulations, OCR will not provide such training or inform the public of age-related requirements. The statement on page 1236 in the hearings record was in response to a question that concerned block grants only. On page 1233, the Director clearly stated that OCR's goals for outreach include involving beneficiaries in efforts to promote voluntary compliance and, making assistance available to all types of recipients on all of the Department's civil rights jurisdictions. These goals would include assistance related to the Age Discrimination Act regulations.

Page 22, text to Footnote 68

The staffing increase to which the Commission refers is for the purpose of conducting project reviews. What the report doe not acknowledge is that these reviews have a distinct technical assistance component. This targeted assistance will have immediate positive impact for program beneficiaries or potential beneficiaries.

Footnote 69 states that "each regional unit was directed to complete at least 24 project reviews in FY 83". This is incorrect. OCR projected the initiation of 350 project reviews in FY 83 and completion of 300 by the end of FY 83. For FY 84, each region was instructed to do at least 24 project reviews in the following areas:

10 Section 504
10 Hill-Burton
4 Title VI

The text regarding footnote 70 states that the VCO increased staff is "responsible for conducting project reviews". In fact, the investigative staff is responsible for conducting project reviews. When the investigator receives an indication that the recipient may be willing to voluntarily take corrective acton, the case is then turned over to the VCO staff for negotiation of a corrective action. It is incorrect to state that VCO is responsible for conducting project reviews.

Page 23, Footnote 71

Should read: "they involve offers of technical assistance."

Page 23, Footnote 72

Current plans are for each region to carry out a minimum of four Title VI-focused project reviews. It is incorrect to say that there would be a maximum of 40 occasions for Title VI technical assistance in the project review context.

Page 23, Footnote 75

The citation from the A-11-53 Report is correct. The reference to "scarce resources" is unsupported. The Commission was told that four professionals devote some portion of their time to the Age Discrimination Act (ADA) coordination function. Additionally, this does not include time spent by outreach staff.

OCR has provided staff as needed through task force efforts to meet the publication and review requirements under ADA, as well as on-going support from the Office of the Associate General Counsel for Enforcement, the Office of the Geneal Counsel and the Office of Management and Policy. In additicn regional and headquarter's staff investigate cases as they arise and technical assistance is provided as requested from recipients an beneficiaries and through special projects such as through development of outreach models with State Units on Aging. (See Annual Report for FY 1982, p.4.)

Page 25, Footnote 80

This sentence should read "delayed final approval of other agencies'...", not "suspended reviews". All regulations were reviewed.

Footnote 82

The statements here appear to evaluate HHS activities in the area of Age discrimination using as a basis correspondence between the Commission and the Department of Justice. This is most inappropriate as OCR has not been privy to the correspondence. If this sentence is to remain a relevant portion of the report, OCR should have the opportunity to review and comment on the documents.

Footnote 83

We are unsure of your specific reference here. However, if the report is relying on information from the FY 82 Annual Age Discrimination Act Report, then you should be aware that a later status resolves any such instances is referenced.

Footnote 84

OCR's first priority has been to work with agencies to ensure publication of proposed of final regulations. Further the report does not mention HHS/OCR activities in evaluating the mediation process and in developing model plans for outreach with State Units on Aging as activities which the Department under-took pending resolution of the OMB "policy differences."

Footnote 85 and 86

The coordination effort referred to by A-11-53 report seems to include only the staff (1 person) required for reviewing and commenting on the regulations submitted by other agencies. The personnel necessary to staff an "enforcement coordination" effort has not been addressed as such. Technical assistance is not included in the one professional staff position alloted, nor is investigative staff. However, such a activities are provided by OCR on a continuous basis. This footnote should indicate final approval of agency regulations will be delayed until resolution of the suit against HHS by the Action Alliance of Senior Citizens et. al. The suit was filed in March 1983.

Page 26, Footnote 87

The report cites the Director's response to Mr. Stokes' question on selection of subjects for compliance reviews. Although the response indicated that existing survey data would be used, the Director also indicated that OCR uses other means for selecting review sites. The contention appears to be that without a survey OCR will be unable to identify issues in the age discrimination area. Other methods, including contacts with community leaders and organizations and review of cases can serve to highlight potential compliance problems.

If you would like to meet to discuss these items further, please contact me.

Sincerely,

Betty Lou Dotson
Director
Office for Civil Rights